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A Warranty Expired: Time to Rid Louisiana of Fitness for Ordinary Use

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A Warranty Expired: Time to Rid Louisiana of Fitness for Ordinary Use

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INTRODUCTION

Imagine a situation in which Betty Buyer purchases a computer printer from Suzie Seller. The first time Betty attempts to print something, the printer bursts into flames. By selling Betty a defective printer, Suzie has breached the warranty of redhibition, which warrants that the thing sold is

free from hidden defects.¹ And yet, as a result of this redhibitory defect, Suzie also may have breached the warranty of fitness for ordinary use, an entirely separate warranty that guarantees the thing sold is reasonably fit for its ordinary use.² The court that addresses Betty's claim must characterize it as either a claim for breach of the warranty of redhibition or a claim for breach of the warranty of fitness.³ The classification of Betty's claim bears capital importance because the rules governing the two warranties differ substantially in terms of remedies and time constraints on the buyer's action.⁴ For instance, if the warranty of fitness governs Betty's claim, she will be subjected to a ten-year prescriptive period⁵ and entitled to contractual damages, assuming Suzie had no knowledge of the defect.⁶ Alternatively, if redhibition governs Betty's claim, it will be subjected to a shorter redhibitory prescriptive period of either one or four years,⁷ and her remedy will be limited to rescission of the sale.⁸

Although it would seem that two distinct warranties governed by wholly different rules would apply to separate and non-overlapping circumstances, recent judicial pronouncements show that courts have

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1. See LA. CIV. CODE art. 2520 (2018) (providing the warranty against redhibitory defects). Here, the printer suffers from a redhibitory defect that causes it to catch on fire.

2. See *id.* art. 2524 (providing the warranty of fitness). The ordinary use of a printer is to print. Thus, if the printer catches on fire while printing, it is not fit for its ordinary use.

3. See generally *id.* arts. 2520, 2524.

4. See, e.g., *id.* arts. 2520–22, 2524, 2530–32, 2534, 2537–38, 2540–41, 2545, 2548.

5. See *id.* arts. 2524, 3499 (providing that a personal action is subject to a liberative prescription of ten years unless otherwise provided by legislation).

6. See *id.* art. 2524 (providing that the general rules of conventional obligations govern a buyer's rights against a seller for breach of warranty of fitness); see also *id.* art. 1994 (providing that an obligor is liable for damages caused by his failure to perform a conventional obligation, which may consist of nonperformance, defective performance, or delayed performance).

7. See *id.* art. 2534 (providing that the action for redhibition against a good faith seller prescribes in four years from the date of delivery or one year from the day the defect was discovered, whichever occurs first, and that the action for redhibition against a bad faith seller prescribes one year from the day the defect was discovered).

8. See *id.* art. 2520 (providing that a buyer has the right to rescission of a sale or to a reduction in the price depending on the nature and extent of the defect).

struggled to determine where one warranty ends and the other begins.⁹ According to one court that found the warranties of fitness and redhibition to be mutually exclusive, “[The warranty of fitness] applies to a situation in which the cause of action is based, not on the defective nature of the thing at issue, but on its fitness for ordinary use”¹⁰ Another court, however, held exactly the opposite: “[W]e find no reason to deem the two articles exclusive.”¹¹ Indeed, these attempts at distinction—or lack thereof—are contradictory and fail to elucidate the circumstances under which each warranty applies.¹² The courts’ confusion is understandable, however, because the legislative distinction between the two warranties is largely artificial, and any separation is unnecessarily trivial.¹³

The differences in remedies, prescriptive periods, and overall legal frameworks of the two warranties¹⁴ may also suggest a legislative determination that, as a matter of policy, the breach of the warranty of fitness is more egregious than the breach of the warranty of redhibition. Further, because the legislature recently added the warranty of fitness,¹⁵ it seems that perhaps this addition was the result of the legislature’s deliberate recognition of the law’s previous failure to adequately address fitness issues under the legal framework for redhibition. Surprisingly, neither of these logical inferences is correct.¹⁶ Indeed, the warranty of

9. See, e.g., *Mouton v. Generac Power Sys., Inc.*, 152 So. 3d 985 (La. Ct. App. 2014); *Sw. La. Hosp. Ass’n v. BASF Const. Chems., LLC*, 947 F. Supp. 2d 661 (W.D. La. 2013); *Hollybrook Cottonseed Processing, LLC v. Carver, Inc.*, No. 09-0750, 2010 WL 892869 (W.D. La. Mar. 11, 2010); *Cunard Line Co. v. Datrex, Inc.*, 926 So. 2d 109 (La. Ct. App. 2006).

10. *Cunard Line Co.*, 926 So. 2d at 114. See also *Stroderd v. Yamaha Motor Corp., U.S.A.*, No. 04-3040, 2005 WL 2037419, at *3 (E.D. La. Aug. 4, 2005) (“[A] breach of contract of fitness for ordinary use claim is only an independent cause of action when an item is free from redhibitory defects.”).

11. *Justiss Oil Co., Inc. v. T3 Energy Servs., Inc.*, No. 1:07-cv-01745, 2011 WL 539135, at *6 (W.D. La. Feb. 7, 2011). The court expressly invited the Louisiana Supreme Court to provide clarification on the issue: “Without Louisiana Supreme Court clarification on this issue, we are not reluctant to side with the overwhelming majority of Louisiana appellate courts.” *Id.* at *5. See also *Sw. La. Hosp. Ass’n*, 947 F. Supp. 2d at 690.

12. See, e.g., *Sw. La. Hosp. Ass’n*, 947 F. Supp. 2d at 690; *Cunard Line Co.*, 926 So. 2d at 114.

13. See discussion *infra* Part II.A.1.

14. See generally LA. CIV. CODE arts. 1994, 2520, 2524, 2534, 3499 (2018); see also discussion *infra* Part II.A.2.

15. See generally *id.* art. 2524 (eff. Jan. 1, 1995).

16. See discussion *infra* Part I.D.

fitness—a common law creation—was never recognized as a stand-alone warranty in Louisiana prior to 1995.¹⁷

By adopting the warranty of fitness as a stand-alone sales warranty, the legislature created an artificial distinction between the warranties of fitness and redhibition that Louisiana courts have been unable to rationalize.¹⁸ If defects are redhibitory,¹⁹ the goods will be unfit for ordinary use by default.²⁰ Accordingly, the warranty of fitness for ordinary use has no independent meaning in Louisiana law of sales.²¹ Courts have reached different conclusions as to whether a buyer who alleges that a product has a redhibitory defect can also argue that the defect renders the product unfit for its ordinary use.²² Because courts differ on this point, similarly situated parties throughout the state remain subject to different rights and obligations.²³

The time has come for Louisiana to rectify its mistakes of the past and undo what never should have been done. This Comment revisits a problem that was identified over a quarter-century ago²⁴ and calls for the repeal of the warranty of fitness for ordinary use as a separate warranty in Louisiana.²⁵ Part I provides an overview and brief history of the warranty of fitness. It surveys the legislative and jurisprudential history of the warranties of fitness and redhibition prior to 1995, analyzing Louisiana jurisprudence and introducing the correlation between the warranties. Part

17. See discussion *infra* Part I.D.

18. See discussion *infra* Part II.A.1.

19. A redhibitory defect is one that “renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect” or else “without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price.” LA. CIV. CODE art. 2520. The warranty of redhibition only covers defects that exist at the time of delivery. See *id.* art. 2530. If a defect is apparent, it is not a redhibitory defect. *Id.* art. 2521.

20. See generally George L. Bilbe, *Redhibition and Implied Warranties Under the 1993 Revision of the Louisiana Law of Sales*, 54 LA. L. REV. 125 (1993).

21. See discussion *infra* Part II.A.1.

22. See, e.g., *Cassidy v. Ford Motor Co.*, No. 15-2483, 2016 WL 687621, at *4 (E.D. La. Feb. 19, 2016); *425 Notre Dame, LLC v. Kolbe & Kolbe Mill Work Co.*, No. 15-454, 2016 WL 1110232, at *5 (E.D. La. Mar. 22, 2016); *Sw. La. Hosp. Ass’n v. BASC Constr. Chems., LLC*, 947 F. Supp. 2d 661 (W.D. La. 2013); *Justiss Oil Co. v. T3 Energy Servs., Inc.*, No. 1:07-cv-01745, 2011 WL 539135, at *5 (W.D. La. Feb. 7, 2011); *Cunard Line Co. v. Datrex, Inc.*, 926 So. 2d 109 (La. Ct. App. 2006).

23. See *supra* note 22.

24. See discussion *infra* Part I.E.

25. See generally LA. CIV. CODE art. 2524 (2018).

I also assesses the impetus for codifying the warranty of fitness in Louisiana. Part II of this Comment delineates the confusion the 1995 codification of the warranty of fitness created, including the warranty's lack of independent meaning and the uncertain scope of its application. Part III proposes the repeal of the impractical and confusing warranty of fitness for ordinary use and demonstrates that any purpose the article sought to serve is better addressed through the warranties of redhibition and fitness for particular use. This Comment concludes by demonstrating that the repeal of the warranty of fitness for ordinary use is vital for the preservation of redhibition, as well as for the development of the warranty of fitness for particular use.

I. A BRIEF HISTORY OF LOUISIANA SALES WARRANTIES: FROM ROMAN LAW TO THE CURRENT CONFUSION

Louisiana law imposes various warranty²⁶ obligations on sellers that are implied by the operation of law regardless of whether they are expressed in a sales agreement.²⁷ In Louisiana, all sales, whether of movable or immovable property, are made with two implied warranties relating to quality.²⁸ First, the seller warrants that the thing sold is free from redhibitory vices or defects that would render it useless or would significantly diminish its value.²⁹ Second, the seller warrants that the thing sold is reasonably fit for both its ordinary use and, under certain circumstances, the particular use contemplated by the buyer.³⁰ Although current law articulates the seller's obligations in fitness and redhibition as distinct warranties subject to separate legal frameworks, this distinction

26. A "warranty" is an assurance that a seller makes regarding the goods or services being sold. Robert P. Thibeaux et al., *Implied Warranties and Waivers (LA)*, PRAC. L. COMMERCIAL TRANSACTIONS (Aug. 2, 2017), <https://us.practical-law.thomsonreuters.com/w-002-2088>.

27. *Id.* The statutory warranties are suppletive, so parties are generally free to limit or exclude one or more warranties within the limitations public policy dictates. DIAN TOOLEY-KOBLETT & DAVID GRUNING, SALES § 10:14, *in* 24 LOUISIANA CIVIL LAW TREATISE (Aug. 2017 update) ("Admittedly, the warranties appear to overlap, and in practice it is sometimes difficult to determine which warranty is applicable to a particular case. Understandably, courts have sometimes had difficulty identifying the relevant warranty.").

28. LA. CIV. CODE arts. 2520, 2524. The seller also warrants the buyer against eviction, which protects the buyer from "loss of, or danger of losing, the whole or part of the thing sold because of a third person's right that existed at the time of the sale." *Id.* art. 2500. But such warranty is outside the scope of this Comment.

29. *Id.* art. 2520.

30. *Id.* art. 2524.

has not always existed.³¹ Whereas Louisiana has recognized the warranty of redhibition since the promulgation of its first Civil Code in 1808,³² the warranty of fitness is a new creation, codified as recently as 1995.³³ A complete understanding of the relationship between these warranties therefore requires an exploration of their historical and jurisprudential roots.

A. Louisiana Sales Warranties: In General

The warranty of redhibition protects a buyer against hidden defects in the thing sold that diminish its value or usefulness.³⁴ The Louisiana Civil Code recognizes two types of redhibitory defects: one that renders the thing useless or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect; and one that, without rendering the thing totally useless, diminishes its usefulness or value so that it must be presumed that a buyer would have bought the thing at a lesser price.³⁵ The former category of redhibitory defect entitles the buyer to a rescission of the sale,³⁶ whereas the latter limits the buyer's recovery to a reduction of the price.³⁷ In the hypothetical described in the Introduction, the printer suffered from a redhibitory defect—namely, combustibility—that rendered its use so inconvenient that Betty presumably would not have bought the printer had she known of the defect.³⁸ Accordingly, Betty would be entitled to rescission of the sale.³⁹ Assume, however, that the printer does not catch on fire but instead prints gray lines across the page. This problem still constitutes a redhibitory defect but one that, instead of rendering the printer completely useless, diminishes its value such that a court would presume that Betty would have paid a lesser price.⁴⁰ Assuming the gray-line problem could be

31. H.B. 106, 1993 La. Sess. Law Serv. Act 841 (1993).

32. See discussion *infra* Parts I.B.1–2.

33. LA. CIV. CODE art. 2524 (1995). See discussion *infra* Part I.B.2.

34. LA. CIV. CODE art. 2520 (2018). See generally TOOLEY-KNOBLETT & GRUNING, *supra* note 27.

35. LA. CIV. CODE art. 2520.

36. *Id.* art. 2497 (providing that when the buyer has the right to recede from the contract, the seller must return the price and reimburse the buyer for expenses of the sale).

37. *Id.* art. 2524. See TOOLEY-KNOBLETT & GRUNING, *supra* note 27, § 11:2.

38. See generally LA. CIV. CODE art. 2520.

39. *Id.*

40. See *id.*

fixed, Betty would be entitled to a reduction of the sales price in the amount required to remedy the defect.⁴¹

If Betty's claim is in redhibition, she must prove that the defect existed at the time of delivery, that it was not apparent, and that it should not have been discovered by a reasonably prudent buyer.⁴² Assuming Suzie did not know of the defect at the time of the sale, Betty must give Suzie notice and an opportunity to repair the defect.⁴³ If Suzie cannot or will not correct it, Betty is entitled to the return of the purchase price and reimbursement of incidental expenses.⁴⁴ Betty's claim in redhibition prescribes either four years from the delivery of the printer or one year from the date she discovered the defect, whichever occurs first.⁴⁵

In addition to redhibition, Betty has a second avenue for recovery—breach of the warranty of fitness.⁴⁶ The Louisiana Civil Code provides for two types of warranties of fitness: fitness for ordinary use and fitness for particular use.⁴⁷ Fitness for ordinary use warrants that the thing sold is

41. *Id.*

42. *Id.* arts. 2521, 2530; LA. CIV. CODE ANN. art. 2521 cmt. c (2018) (“Under this Article the standard of diligence that must be exercised by the buyer in determining whether the thing purchased is defective is that of a prudent administrator.”); *id.* art. 2521 cmt. d (“Under this Article the buyer must make more than a casual observation of the object; he must examine the thing to ascertain its soundness.”). *See also* discussion *infra* Part II.A.2.

43. LA. CIV. CODE art. 2522.

44. *Id.* art. 2531. Incidental expenses include “reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, less the credit to which the seller is entitled if the use made of the thing, or the fruits it has yielded, were of some value to the buyer.” *Id.* Alternatively, a bad faith seller—one who knows that the thing sold has a defect but fails to declare it or makes a false declaration regarding the quality of the thing—is liable to the buyer for the return of the purchase price with interest from the time it was paid, reimbursement of reasonable expenses occasioned by the sale and incurred for the preservation of the thing, and for damages and reasonable attorney fees. *Id.* art. 2545.

45. *Id.* art. 2534. The action for redhibition against a seller who knew, or is presumed to have known, of the existence of a defect in the thing sold prescribes one year from the day the buyer discovered the defect. *Id.*; *see* LA. CIV. CODE ANN. art. 2534 cmt. b (“[A]n action in redhibition prescribes ten years from the time of perfection of the contract regardless of whether the seller was in good or bad faith.”); *id.* cmt. c (“The purpose of a longer prescriptive period is to discourage precipitate action by disappointed buyers, to facilitate the settlement of disputes between buyers and sellers, and to make the prescriptive period consistent with the one prevailing in other jurisdictions.”).

46. *See generally* LA. CIV. CODE art. 2524.

47. *Id.*

reasonably fit for its ordinary use.⁴⁸ Fitness for particular use warrants that the thing is fit for the buyer's particular use if and only if the seller has reason to know the buyer's particular or intended use and that the buyer is relying on the seller's skill or judgment in selecting the thing.⁴⁹ Plainly, a printer that catches fire is unfit for its ordinary use of printing.⁵⁰ Suppose, however, that the printer only caught fire when performing large-scale print jobs and that Betty told Suzie she wanted a printer that could print large documents. Under these circumstances, the printer would likely remain fit for ordinary use because it still prints documents, but nonetheless would be unfit for Betty's particular purpose.⁵¹ In either case, the general rules of conventional obligations would govern Betty's claim for breach of the warranty of fitness.⁵²

If Betty succeeded in her claim for breach of the warranty of fitness, she could obtain dissolution of the sale as well as contractual damages for Suzie's noncompliance with the warranty.⁵³ Betty need not give Suzie the opportunity to repair the defect regardless of whether she had knowledge of the defect.⁵⁴ Significantly, a claim for breach of the warranty of fitness is subject to the ten-year prescriptive period applicable to conventional obligations.⁵⁵

48. *Id.*

49. *Id.* ("When the seller has reason to know the particular use the buyer intends for the thing, or the buyer's particular purpose for buying the thing, and that the buyer is relying on the seller's skill or judgment in selecting it, the thing sold must be fit for the buyer's intended use or for his particular purpose.")

50. *See id.*

51. *See id.*

52. *Id.* *See* discussion *infra* Part II.A.2.

53. LA. CIV. CODE art. 2524 (providing that the buyer's rights for a seller's breach of the warranty of fitness are governed by the rules of conventional obligations); *see generally id.* arts. 1994, 1995, 2013. Contractual damages are comprised of losses sustained and profits deprived. *Id.* art. 1995.

54. *Id.* art. 2524. A good faith obligor is only liable for the damages that were foreseeable at the time the contract was made. *Id.* art. 1996. A bad faith obligor is liable for all damages, foreseeable or not, that are a direct consequence of his failure to perform. *Id.* art. 1997. *See also* LA. CIV. CODE ANN. art. 1997 cmt. b (2018) ("An obligor is in bad faith if he intentionally and maliciously fails to perform his obligation."); *id.* cmt. c ("A truly fraudulent failure to perform of course, would constitute bad faith under this Article.")

55. LA. CIV. CODE art. 3499. The prescriptive period begins to run the moment the cause of action arises—namely, the date of the obligor's failure to perform. *Hawthorne Land Co. v. Occidental Chem. Corp.*, 431 F.3d 221, 228 (5th Cir. 2005).

B. Legislative and Jurisprudential History: Before the Codified Confusion

Although Louisiana currently recognizes two warranties of quality, this was not always the case.⁵⁶ The Louisiana Civil Code has long encompassed the civilian institution of redhibition.⁵⁷ The common law warranty of fitness, however, emerged in Louisiana and grew through the case law, codified only in 1995.⁵⁸ Understanding the complicated relationship between the two warranties,⁵⁹ therefore, requires a thorough examination of Louisiana's espousal of each.

1. Redhibition: A Civilian Institution

The civil law historically has acknowledged and sought to remedy the problem of latent defects in goods by restoring parties to the positions they would have occupied had the defect not caused the failed performance.⁶⁰ The action of redhibition originated in Rome as a system of implied warranty against latent defects and remained largely intact as it permeated Louisiana law by way of France.⁶¹ Over time, Louisiana has added its own nuances to redhibition, but much of the Roman law endures.⁶²

Beginning in Rome around the 1st century B.C., the *curule aediles*⁶³ forced individuals who sold slaves to stipulate expressly that the slaves

56. See generally LA. CIV. CODE art. 2524 (eff. Jan. 1, 1995).

57. See discussion *infra* Part I.B.1.

58. See discussion *infra* Part I.B.2.

59. See discussion *infra* Part II.A.

60. *Young v. Ford Motor Co.*, 595 So. 2d 1123, 1128 (La. 1992). See, e.g., LA. CIV. CODE art. 2520 (1870); *id.* art. 2496 (1825); *id.* art. 66 (1808); CODE NAPOLEON art. 1641 (1804); JUSTINIAN'S DIGEST 21.1.1, § 6.

61. Leonard Oppenheim, *The Law of Slaves—A Comparative Study of the Roman and Louisiana Systems*, 14 TUL. L. REV. 384, 399 (1940). See generally Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 264–65 (1995).

62. Christopher K. Odet, *Commerce, Commonality, and Contract Law: Legal Reform in a Mixed Jurisdiction*, 75 LA. L. REV. 741, 760 (2015). These minor updates were necessary to modernize and provide more even-handedness and predictability in the law. *Id.*

63. The *curule aediles* was the officer in charge of regulating markets and solving conflicts between buyers and sellers. Elizabeth A. Spurgeon, *All For One or Every Man for Himself? What is Left of Solidarity in Redhibition*, 70 LA. L. REV. 1227, 1230 (2010).

were free from defects.⁶⁴ If the seller's statements were untrue, the buyer could bring an action in redhibition within six months to rescind the sale and receive a return of the purchase price.⁶⁵ Thus, Roman law remedied complaints of latent defects by returning the parties to their positions before the sale—a restoration of the status quo.⁶⁶ These rules were later incorporated into Justinian's Digest⁶⁷ and broadened to cover all movables.⁶⁸ When the defect was apparent, the rules of redhibition did not apply.⁶⁹ The seriousness of the defect dictated whether the buyer was entitled to rescission of the sale—*actio redhibitoria*—or monetary compensation for the difference between the sale price and the value of the defective item—*quanti minoris*.⁷⁰

As the Roman law of obligations infiltrated France, redhibition developed and obtained a significant presence in French law.⁷¹ The Code Napoléon provided:

The seller is bound to warranty in respect of secret defects in the thing sold which render it improper for the use to which it was destined, or which so far diminish such use, that the buyer would not have purchased it, or would not have given so large a price, if he had known them.⁷²

64. Daniel E. Murray, *Implied Warranty Against Latent Defects: A Historical Comparative Law Study*, 21 LA. L. REV. 586, 595 (1960). During this period, the rules for slaves were extended to animals, but it is unclear whether they were extended to movables. *Id.* Subsequently, express warranties were no longer mandated, but the *curule aediles* required the seller to announce that the slave did not have certain defects. *Id.*

65. Spurgeon, *supra* note 63, at 1231. A seller's ignorance of the defect was not a valid defense. Murray, *supra* note 64.

66. Bruce V. Schewe & Debra J. Hale, *Review of Recent Developments: 1991–1992*, 53 LA. L. REV. 917, 919 (1993).

67. On Emperor Justinian's order, Justinian's Digest was compiled from 530 to 533 A.D. as part of the *Corpus Juris Civilis*, a compilation of the writings of the classical jurists. *See generally* Stephen Utz, Book Review, 11 CONN. J. INT'L L. 395 (1996) (reviewing DAVID PUGSLEY, *JUSTINIAN'S DIGEST AND THE COMPILERS* (1995)). Specifically, the Digest was a compilation of dozens of classical jurists' writings and was designed to be a comprehensive text of Roman law. *Id.*

68. Murray, *supra* note 64.

69. JUSTINIAN'S DIGEST 21.1.1, § 6.

70. Spurgeon, *supra* note 63, at 1231.

71. *Id.*

72. CODE NAPOLÉON art. 1641 (1804).

As was the case under Roman law, the seller was not accountable for apparent defects.⁷³ The buyer could return the thing and obtain restitution of the price or, alternatively, keep the thing and receive “such a portion of the price . . . as shall be settled by competent persons.”⁷⁴ If the seller knew of the defect, he was bound to pay damages and return the purchase price along with any expenses occasioned by the sale, but if he did not have knowledge, he was bound only to pay restitution of the purchase price and reimburse expenses occasioned by the sale.⁷⁵

Influenced by its Roman and French predecessors, redhibition in early Louisiana law protected slave and animal buyers, among others, against latent defects that were non-apparent⁷⁶ and unknown to the buyer at the time of the sale.⁷⁷ Like its antecedents, the Code of 1808 distinguished between the seller’s liability for defects that were known and unknown to him.⁷⁸ It required the defect to have existed at the time of the sale, although

73. *Id.* art. 1642.

74. *Id.* art. 1644.

75. *Id.* art. 1646. Under early French law, there was no bright-line prescriptive period attached to a redhibition claim; rather, the action had to be brought “within a short interval, according to the nature of such faults, and the usage of the place where the sale was made.” *Id.* art. 1648.

76. The seller was not accountable for the apparent defects or vices that the buyer could have seen himself, “as, for instance, if a horse has his eyes put out.” *Id.* art. 69. “The buyer cannot complain of a defect of which he is ignorant only through his own fault, any more than of those that the seller may have declared to him.” *Id.*

77. The Louisiana Civil Code of 1808 provided: “The seller is bound to declare to the buyer the defects of the thing sold, as far as they are known to him, and if he does not do it, the sale shall be cancelled or the price shall be diminished according to the kind of defects.” LA. CIV. CODE art. 66 (1808). The Code defined redhibition as “the cancelling of the sale on account of some defect in the thing sold, such as may be sufficient to oblige the seller to take it back again and have the sale annulled.” *Id.* art. 65. It defined redhibitory defects and those that render the thing absolutely unfit for the purpose for which it was intended in commerce, diminishing its utility or rendering it so inconvenient that it is presumable that if these defects had been known to the buyer, he would not have bought at all or would have bought at a reduced price. *Id.* art. 67.

78. “Although the defects of the thing sold were unknown to the seller, he will nevertheless be responsible, if these defects are of a hidden nature, and the seller may, in this case, have the sale cancelled or have the price lessened . . .” *Id.* art. 68. “If the seller was acquainted with the defects of the thing, he is liable to all damages toward the buyer, besides the restitution of the price he may have received.” *Id.* art. 71. “If the seller was ignorant of the defects of the thing, he shall only be obliged to the restitution of the price and to make reimbursement to the buyer of the costs occasioned by the sale.” *Id.* art. 72.

a defect that appeared immediately after or within three days following the sale was presumed to have existed at the time of the sale.⁷⁹

The Louisiana Civil Code of 1825 amended the definition of redhibition to encompass “the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.”⁸⁰ Apart from minor changes in semantics and a lengthening of the prescriptive period,⁸¹ the Code of 1825 preserved the law of redhibition as it previously existed.⁸² Likewise, the Code of 1870 retained the characteristics of the Code of 1825.⁸³ The traditional law of redhibition thus remains largely intact today, enduring as a civilian institution embedded deeply in Louisiana law.⁸⁴

2. *The Warranty of Fitness: A Jurisprudential Embrace*

In contrast to the state’s long history with the warranty of redhibition, Louisiana’s relationship with the warranty of fitness is limited.⁸⁵ The legislature did not adopt the warranty until 1995, but the notion of “fitness” was not foreign to Louisiana law prior to that time.⁸⁶ Indeed, Louisiana courts formerly recognized “fitness” as a component of redhibition,⁸⁷

79. *Id.* art. 76. The buyer could initiate the action within six months from the date of the sale or from the time the defect was discovered, provided that more than one year had not elapsed since the sale. *Id.* art. 75.

80. *Id.* art. 2496 (1825).

81. When the seller did not know of the vice, the redhibitory action had to be commenced within a year of the date of the sale. *Id.* art. 2512. When the seller knew of the vice and failed to declare it, the action could be commenced at any time, provided that a year had not elapsed since the discovery of the vice. *Id.* art. 2524.

82. As in the Code of 1808, neither apparent defects nor defects that the seller declared to the buyer prior to the sale constituted redhibitory defects. *Id.* arts. 2497–98. Likewise, the defect must have existed before the sale. *Id.* art. 2508. A good faith seller was bound to restore the price and to reimburse the expenses occasioned by the sale and incurred for the preservation of the thing, but a bad faith seller was answerable in damages. *Id.* arts. 2509, 2523.

83. *See generally id.* arts. 2520–47 (1870).

84. *See generally supra* note 4.

85. *Id.* *See* LA. CIV. CODE art. 2524 (eff. Jan 1, 1995).

86. *See* LA. CIV. CODE ANN. art. 2524 cmt. a (2018) (noting that, although the article is new, it does not change the law because the Louisiana jurisprudence has recognized the existence of the obligation).

87. *See, e.g.,* *Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc.*, 262 So. 2d 377 (La. 1972); *Falk v. Luke Motor Co.*, 112 So. 2d 683 (La. 1959); *Radalec Inc. v. Automatic Firing Corp.*, 81 So. 2d 830 (La. 1955); *Jackson*

suggesting an inherent endorsement of fitness long before its eventual enactment.

The warranty of fitness first appeared in Louisiana jurisprudence in the 1900 case of *Fee v. Sentell*, in which the Louisiana Supreme Court stated, “We are only announcing a principle which no one denies when we state that the vendor, unless warranty is waived, warrants the thing sold as fit for the particular purpose for which it was bought.”⁸⁸ *Fee* involved the sale of sugarhouse machinery, which the buyer alleged was not what the vendor guaranteed because it was in imperfect condition, broken, and unfit for use.⁸⁹ Recognizing that secondhand machines cannot do the work of new ones, the court stated that a secondhand machine must nonetheless be “fit to do the work the contract intended.”⁹⁰ In so stating, the court did not attempt to distinguish fitness from redhibition⁹¹ but, rather, appeared to utilize different terminology to refer to the same concept.⁹²

Louisiana courts subsequently alluded to the existence of a warranty of fitness without distinguishing it from the warranty of redhibition.⁹³ For example, in *Falk v. Luke Motor Co.*, the Louisiana Supreme Court held that an automobile that will not run, or that runs intermittently and requires the frequent attention of a mechanic, is “manifestly not fit or acceptable for the purposes intended” and granted relief under the law of redhibition.⁹⁴

Courts also continually referred to products as “unfit” for use because of latent defects, effectively analyzing fitness as a component of

v. Breard Motor Co., 120 So. 478 (La. 1929); Crawford v. Abbott Auto. Co., 101 So. 871, 872 (La. 1924).

88. *Fee v. Sentell*, 28 So. 279, 282 (La. 1900).

89. *Id.* at 280.

90. *Id.* at 282.

91. *Id.* at 279 (noting that a vendee is not entitled to an action *quantum minoris* for defects discoverable on mere inspection).

92. *Id.* at 282–83 (“The buyer, in our judgment, is without the right to a diminution of the price for any *defect* discoverable upon simple inspection.”) (emphasis added).

93. LA. STATE L. INST., REVISION OF THE LAW OF SALES: WARRANTY OF FITNESS, No. 8-1-89, at 3 (Nov. 17–18, 1989) (prepared for Meeting of the Council by Saul Litvinoff, Reporter). *See also supra* note 87.

94. *Falk v. Luke Motor Co.*, 112 So. 2d 683, 686 (“[H]aving purchased this car to meet specific needs and a desirable increase in the volume of his business, its defects, imperfections, and successive mechanical failures requiring almost constant replacements, changes and repairs became a malignant and oppressive burden, the relief from which is to be found in the redhibitory action.”).

redhibition.⁹⁵ In *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, for example, the Louisiana Supreme Court reversed an appellate court's ruling that denied warranty rights to the purchaser of an imported Mercedes-Benz against the American distributor of Mercedes-Benz that supplied the automobile to the dealer.⁹⁶ Immediately after the purchase, the buyer found the automobile "unsuitable for use," alleging a number of defects.⁹⁷ In holding that the buyer could recover from the defendant, the Court stated, "We see no reason why the [consumer-protection] rule should not apply to the pecuniary loss resulting from the purchase of a new automobile that proves unfit for use because of latent defects."⁹⁸ The Court evidently viewed fitness as a component of, or a way of establishing, redhibition rather than as a stand-alone warranty.⁹⁹ Likewise, in *Young v. Ford Motor Co.*, the Louisiana Supreme Court referred again to fitness as a way of establishing the existence of a defect, stating, "A buyer of an automobile who asserts a redhibition claim need not show the particular cause of the defects making the vehicle unfit for the intended purposes, but rather must simply prove the actual existence of such defects."¹⁰⁰ By acknowledging that the combination of vices rendering the car unfit for use resulted in a claim of redhibition, the Court treated the warranty of fitness as indistinguishable from the warranty against redhibitory defects.¹⁰¹

Before the codification of the warranty of fitness, even when courts seemingly identified it as independent and distinct from the warranty against redhibitory defects,¹⁰² the distinction was inconsequential because Louisiana courts recognized no remedies beyond those under redhibition.¹⁰³ Even if the court referred to the warranties of redhibition and fitness independently, the same legal framework governed each.¹⁰⁴

95. See, e.g., *Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc.*, 262 So. 2d 377, 381 (La. 1972).

96. *Id.* at 377.

97. *Id.* at 380. The defects included: a peeling off of the interior trim; failure of the interior lights to burn; transmission problems; stalling in traffic; a defective air conditioner; excessive brake squeal; deterioration of rear window channels; uncorrectable vibration; and paint deficiencies. *Id.*

98. *Id.* at 381.

99. *Id.*

100. *Young v. Ford Motor Co.*, 595 So. 2d 1123, 1126 (La. 1992).

101. *Id.*

102. See *infra* text accompanying notes 226–30.

103. See, e.g., *Rey v. Cuccia*, 298 So. 2d 840 (La. 1974); *Hob's Refrigeration & Air Conditioning, Inc. v. Poche*, 304 So. 2d 326, 328 (La. 1974).

104. See, e.g., *Young*, 595 So. 2d at 1126; *Rey*, 298 So. 2d at 840; *Hob's Refrigeration*, 304 So. 2d at 328; *Media Prod. Consultants*, 262 So. 2d at 377.

Until the revision of the law of sales in 1995, courts conceived fitness as comprising part of the warranty against redhibition.¹⁰⁵ The failure of a thing to be fit for use constituted a breach of the warranty of redhibition; proof that the thing was unfit for use was proof of a defect's existence; and breach of fitness resulted in the seller's liability under redhibition.¹⁰⁶

Although courts did not refer to the warranty of "particular use" by name prior to the Sales Revision, a solution existed if a seller delivered a thing that was not defective but otherwise did not meet a buyer's expectations: the law of conventional obligations.¹⁰⁷ Some cases referred to a warranty of fitness for "intended" use,¹⁰⁸ but like ordinary fitness, the courts considered it merely an element of redhibition.¹⁰⁹ Although it may seem unusual for courts to fashion new terminology—namely, fitness—

Indeed, in the 1961 decision of *Crowley Grain Drier, Inc. v. Fontenot*, a Louisiana appellate court stated that "unlike damages for other contractual breaches, damages caused by a breach of the warranty in a contract of sale are regarded as founded upon redhibition and subject instead to the cited codal prescription . . . applicable to redhibitory actions." 132 So. 2d 573, 577 (La. Ct. App. 1961).

105. See cases cited *supra* note 104.

106. See cases cited *supra* note 104. Redhibitory remedies included either reduction of the price or rescission and, in the case of the seller's knowledge of the offending defect, damages and attorney fees. LA. CIV. CODE arts. 2520, 2531, 2545 (2018).

107. See, e.g., *Victory Oil, Co. v. Perret* 183 So. 2d 360, 364 (La. Ct. App. 1966) ("The defendants . . . have injected the false issue of redhibition . . . in an attempt to bring the action within a one year prescriptive period. We hold that the real issue raised by the petition in reconvention is one of damages arising out of an alleged breach of contract."); see also LA. CIV. CODE ANN. art. 2529 cmt. a (2018) (providing that the article, although new, does not change the law); *id.* art. 2529 cmt. f ("When a product is contracted for and a product other than what was agreed upon is supplied, such a situation gives rise to an action for breach of contract . . .").

108. See, e.g., *Media Prod. Consultants*, 262 So. 2d at 380 ("Two warranty obligations are inherent in every sale, the warranty of merchantable title and the warranty of reasonable *fitness for the product's intended use*.") (emphasis added); *Falk v. Luke Motor Co.*, 112 So. 2d 683, 686 (La. 1959) ("[A] car which will not run or which runs intermittently requiring the frequent attention of a mechanic to keep it going is an abomination and is manifestly *not fit or acceptable for the purposes intended*.") (emphasis added); *Jackson v. Breard Motor Co.*, 120 So. 478, 479 (La. 1929) ("It cannot be denied that an automobile which is not in running condition is *not fit for the purpose intended*.") (emphasis added); *Crawford v. Abbott Auto. Co.*, 101 So. 871, 872 (La. 1924) ("It is not incumbent upon the buyer to seek out, allege, and prove the particular and underlying cause of the *defects* which make the thing sold *unfit for the purpose intended* . . .") (emphasis added).

109. See discussion *supra* Part I.B.2.

for an already existing framework, the term had roots in the common law with which the courts undoubtedly were familiar.¹¹⁰

C. Common Law Warranties of Fitness and Merchantability: A Possible Explanation for Article 2524

Although the civil law historically sought to protect buyers from defective goods through redhibition,¹¹¹ the English doctrine of *caveat emptor*¹¹² long prevailed in the common law, affording limited protection to buyers.¹¹³ Until the 19th century, English courts suggested that a seller could not be held liable for selling an item of substandard quality unless he had knowledge of such quality.¹¹⁴ It was not until the seminal decision of *Gardiner v. Gray* that the implied warranty of merchantability¹¹⁵ appeared in the common law.¹¹⁶ In *Gardiner*, the buyer bought silk of “waste” grade from Gray but received silk of an even lower grade.¹¹⁷ For the first time, the court held that *caveat emptor* did not apply to a buyer who did not have an opportunity to inspect the goods.¹¹⁸ The question for

110. See discussion *infra* Part I.C.

111. See discussion *supra* Part I.B.1.

112. The doctrine of *caveat emptor* declares that a purchaser is expected to make his own examination of products, and a vendor is generally not liable for any harm resulting to him or others resulting from defects existing at the time of the transfer. *Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 209 (D. Conn. 2001); see also *State ex rel. Jones Store Co. v. Shain*, 179 S.W.2d 19, 20 (Mo. 1944) (Under the rule of *caveat emptor*, “the buyer takes the risk of quality and condition unless he protects himself by warranty, or there has been a false representation made fraudulently by the vendor”).

113. *Young v. Ford Motor Co.*, 595 So. 2d 1123, 1128 (La. 1992).

114. 18 WILLISTON ON CONTRACTS § 52:67 (4th ed. 2017). See, e.g., *Parkinson v. Lee*, 102 E.R. 389 (1802) (“[T]he law does not raise an implied warranty that the commodity should be merchantable; though a fair merchantable price were given; and therefore if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part, such seller is not answerable, though the goods turned out to be unmerchantable.”) (internal parenthetical information omitted).

115. Although “merchantability” was not defined during the common-law era, courts spoke of merchantable goods as being “of a quality such as is generally sold in the market and suitable for the purpose for which they [were] intended, although not of the best quality.” *Wallace v. L.D. Clark & Son*, 174 P. 557, 558 (Okla. 1918).

116. Don Brown, *Sales—Breach of Implied Warranty*, 23 TEX. L. REV. 200, 200 (1945). See *Gardiner v. Gray*, 4 Camp. 144, 171 (K.B. 1815).

117. *Gardiner*, 4 Camp. at 171.

118. *Id.* (“Without any particular warranty, this is an implied term in every such contract He cannot without a warranty insist that it shall be of any

the court became whether the item purchased was of such a quality “as can be reasonably brought into the market to be sold as such waste silk”¹¹⁹ In holding for the buyer, the court concluded that the silk was unfit for the purposes of waste silk and thus could not be sold for the requisite value.¹²⁰ Courts thereafter began to recognize that at least if the goods were purchased by description, a commercial seller of goods impliedly warranted them to be of merchantable quality.¹²¹

The modern iteration of the English warranty of merchantability is codified in the Uniform Commercial Code (“U.C.C.”).¹²² Article 2 of the U.C.C., which governs the sale of goods in every state but Louisiana,¹²³ provides two different warranties of quality: the warranty of merchantability, which encompasses fitness for ordinary use; and the warranty of fitness for a particular purpose known to the seller.¹²⁴ The implied warranties of merchantability and fitness operate to protect buyers

particular quality or fitness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them.”).

119. *Id.*

120. *Id.*

121. Brown, *supra* note 116. See *Gardiner*, 4 Camp. 114. “[I]t was acknowledged in numerous early cases that a manufacturer impliedly warrants its goods to be merchantable, that is, that they are reasonably fit for the general purpose for which they were manufactured.” WILLISTON, *supra* note 114.

122. See U.C.C. §§ 2-314, 2-315 (AM. LAW INST. & UNIF. COMM’N 2018). The Uniform Sales Act followed the English Sale of Goods Act, which was intended to codify the previously existed common law, on the subject of implied warranties of quality. WILLISTON, *supra* note 114. The U.C.C. provisions on the implied warranty of merchantability and fitness for a particular purpose have superseded the provisions of the Uniform Sales Act. *Id.*

123. TOOLEY-KNOBLETT & GRUNING, *supra* note 27, § 1:4.

124. See generally U.C.C. §§ 2-314 and 2-315. The applicability of one warranty over another depends on whether the buyer’s purpose is “ordinary” or “particular.” This is a significant distinction when goods are fit for ordinary purposes, thus satisfying the warranty of merchantability, but are otherwise unfit for the buyer’s particular purpose, thus breaching the warranty of fitness. Vincent M. Gonzales, *The Buyer’s Specifications Exception to the Implied Warranty of Fitness for a Particular Purpose: Design or Performance?*, 61 S. CAL. L. REV. 237, 249 (1987). According to the legislative commentary, a particular purpose differs from an ordinary purpose because a particular purpose envisions a buyer’s specific use “which is peculiar to the nature of his business,” whereas an ordinary purpose entails “uses which are customarily made of the goods in question.” See U.C.C. § 2-315 cmt. 2.

from loss resulting from the sale of goods below commercial standards or unfit for the buyer's particular purpose.¹²⁵

The warranty of merchantability provides, in relevant part, that if the seller is a merchant with respect to goods of that kind, the goods must be fit for the ordinary purposes for which such goods are normally used.¹²⁶ A breach of the warranty of merchantability "will be readily found . . . where the goods are so obviously defective that they are not suitable for any of their ordinary uses or at least for their principal use."¹²⁷ The absence of a manifested defect precludes a cognizable claim for breach of the implied warranty of merchantability.¹²⁸ Thus, under the U.C.C., a product is fit for ordinary use when it is free from defects that would inhibit its use.¹²⁹ In contrast, when an action is based on breach of warranty of fitness, the product may be entirely free from defects yet unfit for the particular purpose that the buyer intends.¹³⁰ Thus, the common law's warranty of fitness for particular purpose exists, as under Louisiana law, irrespective of the existence of a defect.¹³¹

Although courts originally conceived the warranty of merchantability as one in tort,¹³² courts today generally recognize that breach of an implied warranty can sound in either contract or tort, depending on the

125. WILLISTON, *supra* note 114.

126. U.C.C. § 2-314. *See* WILLISTON, *supra* note 114, § 52:77. "Ordinary purposes" include those the manufacturer or seller intended and those that are reasonably foreseeable. *Id.*

127. WILLISTON, *supra* note 114, § 52:77. Goods are not fit for their ordinary purposes "when they break or need frequent or extensive repairs early on when used in an ordinary manner; [or] when they are completely useless and therefore unfit for any purpose." 26 AM. JUR. PROOF OF FACTS § 6 (2d ed. 2017).

128. *In re Air Bag Products Liability Litigation*, 7 F. Supp. 2d 792, 805 (E.D. La. 1998). It is well established that "[p]urchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own." *Id.* (quoting *Hubbard v. General Motors Corp.*, 1996 WL 274018, at *3 (S.D.N.Y. May 22, 1996)).

129. *See, e.g., Rudolph v. Huckman*, 267 A.2d 896 (Del. 1970) (holding that a boat is not of merchantable quality when, because of numerous defects, it cannot be used); *see also Limestone Farms, Inc. v. Deere & Co.*, 29 P.3d 457, 461 (Kan. 2001) ("Implied warranties arise by operation of law . . . their purpose being to protect a consumer from loss where merchandise fails to meet normal commercial standards.").

130. *Barazzotto v. Intelligent Sys., Inc.*, 532 N.E.2d 148, 150 (Oh. Ct. App. 1987).

131. *See generally* U.C.C. § 2-315; *see also* discussion *infra* Part II.B.

132. H.B. 106, 1993 La. Sess. Law Serv. Act 841.

circumstances.¹³³ In either event, the contractual warranty of merchantability serves as a rough analogue to Louisiana's warranty against redhibitory defects in the context of sales of goods, providing the buyer with a remedy if the goods sold to him do not conform to the accepted standards of quality, just as the contractual warranty of fitness is an analogue to Louisiana's warranty of fitness for particular use.¹³⁴

D. Impetus of Codification

In 1985, under the leadership of Professor Saul Litvinoff, the Louisiana State Law Institute¹³⁵ commenced a wholesale revision of the law of sales with the goal of modernizing the law.¹³⁶ Because Louisiana had experienced vast societal changes since the enactment of the sales title, the Law Institute deemed a wholesale revision of the law appropriate.¹³⁷ National and international legislative innovations in the law of sales stood in clear contrast to Louisiana's outdated provisions.¹³⁸ Article 2 of the U.C.C. and the 1980 Convention on International Sales served as models for the Law Institute, offering practical approaches to contemporary sales problems.¹³⁹ The revision embraced several Article 2 provisions, but the

133. See, e.g., *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 704 (Tex. 2008). Courts identify the nature of the claim by examining the damages alleged—if the damages alleged are purely economic, the claim is contractual; if the damages alleged are for personal injury, the claim is tortious. *Id.* at 705.

134. See generally LA. CIV. CODE arts. 2520, 2524 (2018); U.C.C. §§ 2-314, 2-315.

135. The Louisiana State Law Institute is an official advisory law revision commission, law reform agency, and legal research agency of the State of Louisiana. LA. REV. STAT. § 24:201 (2018).

136. See TOOLEY-KNOBLETT & GRUNING, *supra* note 27, § 1:6. The Law Institute initiated the sales revision as part of the ongoing revision of the Louisiana Civil Code. *Id.* Professor Litvinoff drafted revision proposals for consideration, which the Council of the Louisiana State Law Institute either accepted or rejected after extensive discussion. *Id.*

137. J. Peter Kovata, *The Revision of the Louisiana Civil Code Sales Title: In Many Ways a Non-Event*, 40 LOY. L. REV. 139 (1994); see also TOOLEY-KNOBLETT & GRUNING, *supra* note 27, § 1:6.

138. H.B. 106, 1993 La. Sess. Law Serv. Act 841.

139. *Id.* The Law Institute debated adopting Article 2 of the U.C.C. *in globo*, but the Council ultimately decided that certain common law provisions were inconsistent with fundamental principles of Louisiana law. *Id.*

drafters professed to retain the basic civilian character of the Louisiana law of sales,¹⁴⁰ preserving redhibition as a Louisiana institution.¹⁴¹

Although the sales revision project commenced in 1985,¹⁴² the idea of adopting a separate warranty of fitness was not introduced until 1989 when, in considering the definitional article for redhibition, a Law Institute Council member moved to remove the idea of fitness from the law of redhibition and to create a stand-alone warranty encompassing the concept.¹⁴³ Because of redhibition's similarity to the warranty of merchantability,¹⁴⁴ this Council member presumably desired to incorporate the warranty of fitness for *particular* use into Louisiana's law, although the minutes of the Council meeting indicate that the Council did not discuss the distinction between merchantability and fitness.¹⁴⁵

Thereafter, the Council requested that the project's reporter, Professor Litvinoff, consider the possibility of creating a separate warranty of fitness distinct from the warranty of redhibition.¹⁴⁶ Professor Litvinoff complied with this request and assessed the need for such a warranty.¹⁴⁷ Ultimately, Professor Litvinoff recommended the Sales Committee avoid this approach, finding the adoption of the warranty of fitness in Louisiana both unnecessary and potentially problematic.¹⁴⁸ In a memorandum to his Committee, Professor Litvinoff recommended as follows:

It seems to the Reporter that adoption by the Council of the warranty of fitness as a separate warranty in the Louisiana law of sales would carry the danger of introducing 'through the back door' the tort approach of the U.C.C. into the Louisiana law of redhibition. This could wreak veritable havoc in the law, one of

140. *Id.*

141. Odinet, *supra* note 62, at 766. "Not eager to be completely submerged under the common law waters, Louisiana chose to moor itself to the ancient civil law institution of redhibition." *Id.* See discussion *supra* Part I.B.1.

142. LA. STATE L. INST., MEETING OF THE COUNCIL, *Revision of the Law of Sales: Redhibition*, at 4 (May 19–20, 1989).

143. *Id.*

144. See discussion *infra* Part II.A.1.

145. See generally *supra* note 142.

146. LA. STATE L. INST., REVISION OF THE LAW OF SALES: WARRANTY OF FITNESS, No. 8-1-89, at 1 (Nov. 17–18, 1989) (prepared for Meeting of the Council by Saul Litvinoff, Reporter).

147. *Id.*

148. *Id.* ("At the meeting of May, 1989 the Reporter was asked to give some Summer thoughts to the possibility of incorporating into the articles on redhibition a separate warranty of fitness of a thing for its intended use. The Reporter has done so and reached the conclusion that no such warranty is needed.")

the probable results of which would be the demise of the law of redhibition. On the other hand, the Reporter sees no need for introducing legislation on the warranty of fitness, since, in the Reporter's opinion, the proposed articles on redhibition strike a fair balance between the interests of buyer and seller and are suitable for solving most of the problems that arise in this area.¹⁴⁹

By stating that the proposed redhibition articles would solve most potential problems,¹⁵⁰ Professor Litvinoff likely meant that Louisiana law adequately remedied the sale of both defective and non-defective goods without a separate warranty of fitness.¹⁵¹ He recognized that Louisiana courts already acknowledged the role that fitness—in the sense of merchantability—played in redhibition.¹⁵² Moreover, the revision effort already addressed any concern about leaving a buyer unprotected when he purchased a thing that, although not defective, did not conform to his expectations.¹⁵³ Thus, no gap in the law existed to justify the adoption of the warranty of fitness as a stand-alone warranty; redhibition already encompassed fitness for ordinary use, and the law could handle problems of non-redhibitory, but otherwise non-conforming, goods as breach of contract claims.¹⁵⁴

Despite Professor Litvinoff's view, he anticipated that other committee members would feel differently.¹⁵⁵ As such, he proposed two variations of a warranty of fitness article, both sourced from the U.C.C.¹⁵⁶ The first proposed article stated:

149. *Id.* at 6.

150. *Id.*

151. *See infra* text accompanying notes 152–54.

152. LA. STATE L. INST., *supra* note 146, at 6 (prepared for Meeting of the Council by Saul Litvinoff, Reporter). *See* discussion *supra* Part I.B.2.

153. The Council adopted current article 2529, which provides for contractual damages when a thing sold is free from redhibitory defects but otherwise not of the kind or quality specified in the contract, prior to Professor Litvinoff's recommendation. LA. STATE L. INST., REVISION OF THE LAW OF SALES: REDHIBITION, No. 7-17-89, at 1 (Nov. 17–18, 1989) (prepared for Meeting of the Council by Saul Litvinoff, Reporter). *See* LA. CIV. CODE art. 2529 (2018) (“When the thing the seller has delivered, though in itself free from redhibitory defects, is not of the kind or quality specified in the contract or represented by the seller, the rights of the buyer are governed by other rules of sale and conventional obligations.”). Even without this article, however, the same result exists under sales law and the law of conventional obligations.

154. *See* LA. CIV. CODE arts. 2520, 2529.

155. *See* LA. STATE L. INST., *supra* note 146.

156. *Id.*

The seller warrants that the thing sold is reasonably fit [for its ordinary purpose] [for the ordinary use of which such thing is susceptible] [for its intended use].¹⁵⁷

An alternate draft included an additional sentence:

When the seller has reason to know the buyer's particular purpose in buying the thing and that the buyer is relying on the seller's skill or judgment in selecting it, the seller warrants the thing selected is fit for the buyer's particular purpose.¹⁵⁸

Neither alternative contemplated that the general rules of conventional obligations, rather than the law of redhibition, would govern noncompliance with the warranty.¹⁵⁹ Instead, the proposed articles remained silent on the matter,¹⁶⁰ indicating that the warranty of fitness would be afforded the same treatment as the warranty of redhibition.

When the Council finally considered the proposed warranty of fitness article, Professor Litvinoff stated that Louisiana courts recognized the existence of a warranty of fitness, but he suggested that "it wasn't clear from the cases whether the warranty of fitness [was] part of redhibition or whether it [was] something independent from redhibition."¹⁶¹ One Council member opined that a distinction existed between the warranties of fitness and redhibition and that he therefore saw no danger in bringing U.C.C. products liability law "through the back door" by enacting an article expressly providing for the warranty of fitness.¹⁶² The Council member suggested that the warranty of fitness follow redhibition in the Louisiana Civil Code as another warranty that the seller owes.¹⁶³ Subsequently, Professor Litvinoff presented the following revised article on the warranty of fitness:

The thing sold must be reasonably fit for its ordinary purpose.

When the seller has reason to know the particular use the buyer intends for the thing, or the buyer's particular purpose for buying the thing, and that the buyer is relying on the seller's skill or judgment in selecting it, the thing sold must be fit for the buyer's

157. *Id.* at 7.

158. *Id.*

159. *Id.* at 6.

160. *Id.* at 7.

161. LA. STATE L. INST., MEETING OF THE COUNCIL, at 4 (May 18–19, 1990).

162. *Id.*

163. *Id.*

intended use or for his particular purpose.

If the thing is not so fit, the buyer's rights are governed by the general rules of conventional obligations.¹⁶⁴

One Council member noted that the article addressed a thing that is not, in itself, defective and proposed a comment to that effect.¹⁶⁵ Another member moved to adopt the proposed article with a change in the first paragraph from "purpose" to "use," and the motion carried—the warranty of fitness was adopted by the Council.¹⁶⁶

The Council may not have fully understood that the new article incorporated two stand-alone warranties, namely, the warranty of fitness for ordinary use and the warranty of fitness for particular use.¹⁶⁷ The Council considered the two warranties of fitness, as well as the potential overlap with redhibition *in globo*, failing to consider the separate ramifications of each.¹⁶⁸ Given that redhibition already encompassed the warranty of fitness for ordinary use and that the warranty of fitness for particular use had not previously existed,¹⁶⁹ the Council may have meant to incorporate the warranty of fitness for particular use but failed to differentiate it from the warranty of fitness for ordinary use.¹⁷⁰ Although the Law Institute failed to acknowledge the gravity of its decision,¹⁷¹ a number of scholars foresaw the complications that the adoption of the stand-alone warranty of fitness would cause in Louisiana.¹⁷²

E. Twenty-Five Years Ago: A Prediction Foretold

Even before the legislative enactment of the warranty of fitness became effective, scholars called for clarification.¹⁷³ In 1993, Professor George Bilbe of Loyola Law School wrote an article in which he referred to article 2524 as "what may be the most significant article in the

164. *Id.* at 5.

165. *Id.* The Council did not adopt such a comment. *See generally* LA. CIV. CODE art. 2524 (2018).

166. LA. STATE L. INST., *supra* note 161, at 5.

167. *See generally* LA. CIV. CODE art. 2524.

168. *See* LA. STATE L. INST., *supra* note 161.

169. *See supra* text accompanying notes 152–54.

170. *See* LA. STATE L. INST., *supra* note 161.

171. *See, e.g.*, LA. CIV. CODE ANN. art. 2524 cmt. a (2018) (declaring that the article does not change the law).

172. *See, e.g.*, Bilbe, *supra* note 20, at 147.

173. *See id.*

revision.”¹⁷⁴ In examining both the traditional concepts of redhibition and the newly codified warranties, Bilbe endeavored to locate the provisions in the revision that needed clarification or refinement.¹⁷⁵ Analyzing the assertion that article 2524 did not change the law, Professor Bilbe accurately anticipated that “the Law Institute may have done much more than its comment suggests.”¹⁷⁶ He pointed out that “[b]ecause things having redhibitory defects are ‘useless’ or have significantly diminished ‘usefulness’ or ‘value,’ the legislation contains a definitional overlap in that the presence of redhibitory defects results in the absence of reasonable fitness for ordinary use.”¹⁷⁷ Bilbe further recognized that the overlap presented difficulties concerning remedies because the breach of the warranty of fitness for ordinary use allows recovery of full contract damages, whereas redhibition limits a buyer’s remedies to return of the purchase price and incidental expenses.¹⁷⁸

Professor Bilbe argued that in cases of good faith sellers of defective items, a change in the law appeared unavoidable. A good faith seller was not responsible for damages resulting from redhibitory defects, but under the new law, the aggrieved buyer could seek damages and dissolution of the sale under the warranty of fitness for ordinary use.¹⁷⁹ Accordingly, buyers of defective goods would assert that the good faith sellers breached the warranty of fitness for ordinary use rather than bring a claim in redhibition.¹⁸⁰ Relying on the circular reasoning surrounding the doctrine of fitness, buyers might argue that if the defects are redhibitory, the goods will be unfit for ordinary use.¹⁸¹ Bilbe thus envisioned that “the revision may well afford an alternative more lucrative than an action in redhibition in every instance where items are affected by redhibitory defects.”¹⁸² Indeed, augmenting the warranty of fitness at the expense of redhibition would yield unacceptable results given redhibition’s fundamental role in Louisiana law.¹⁸³

Professor Bilbe also considered whether courts would recognize the breach of the warranty of fitness for ordinary use in situations that the law

174. *Id.* at 138.

175. *Id.* at 125.

176. *Id.* at 138–39.

177. *Id.* at 146–47.

178. *Id.* at 147.

179. *Id.* at 140.

180. *Id.*

181. *Id.*

182. *Id.* at 140–41.

183. *See* discussion *supra* Part I.B.1.

of redhibition already remedied.¹⁸⁴ He predicted that if courts were to deny actions for breach of the warranty of fitness for ordinary use when the unfitness was a result of a redhibitory defect, the warranty of fitness for ordinary use would apply in relatively few, if any, situations.¹⁸⁵ Moreover, an anomalous situation would exist in which buyers who desired greater recoveries would assert that the items they purchased were initially without defects, whereas sellers would contend that the items were defective on the date of sale.¹⁸⁶ Accordingly, Bilbe concluded that “[t]he issue call[ed] for legislative clarification.”¹⁸⁷ Revisiting a number of the problems he identified, one thing is clear: 25 years later, the evermore confusing issue continues to call for legislative clarification.¹⁸⁸

II. THE FALLOUT

The revised sales law, which went into effect on January 1, 1995,¹⁸⁹ was ostensibly only a “facelift” that updated and recast the sales articles in clear language.¹⁹⁰ Despite purporting to leave the foundations of the law intact,¹⁹¹ the revision has wreaked havoc in the realm of Louisiana’s sales warranties.¹⁹² The recognition of contractual remedies for breach of the warranty of fitness effected a substantial change in the law, as the subsequent jurisprudence indicates.¹⁹³ Whereas before 1995, the warranty

184. Bilbe, *supra* note 20, at 141.

185. *Id.*

186. *Id.* Whereas a cognizable claim in redhibition requires the defect to be non-apparent, unknown to the buyer, and to have existed at the time of the sale, a claim for breach of the warranty of fitness has no such requirements. *See generally* LA. CIV. CODE arts. 2520, 2522, 2524 (2018).

187. Bilbe, *supra* note 20, at 147.

188. *See* discussion *supra* Part II.A.1.

189. H.B. 106, 1993 La. Sess. Law Serv. Act 841.

190. TOOLEY-KNOBLETT & GRUNING, *supra* note 27, § 1:6. Professor Litvinoff noted, “In spite of their age, the old articles did not deserve to be totally eliminated. What was needed was a major overhaul; a structural and functional renovation that left the foundations intact.” *Id.*

191. The legislature disclaims any intention of changing the law through the enactment of the warranty of fitness. *See* LA. CIV. CODE ANN. CODE art. 2524 cmt. a (2018) (“This Article is new. It does not change the law, however. It gives express formulation to the seller’s obligation of delivering to the buyer a thing that is reasonably fit for its ordinary use. The Louisiana jurisprudence has recognized the existence of that obligation . . .”).

192. *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 27, § 1:6.

193. Bilbe, *supra* note 20, at 140. *See, e.g.*, LA. CIV. CODE art. 2524 (2018); LA. CIV. CODE ANN. art. 2524 cmt. a.

of fitness existed only as “either a jurisprudential gloss on redhibition or as a casual independent statement of the court on the responsibilities of the seller,”¹⁹⁴ the revision removed fitness from redhibition entirely, resulting in two independent warranties¹⁹⁵ with separate legal frameworks where there was previously only one.¹⁹⁶

Moreover, “warranty of fitness for ordinary use” has not developed an independent meaning in Louisiana during the last decade.¹⁹⁷ No articulable legislative definition exists, and the jurisprudence is not helpful; courts prior to revision equated fitness with redhibition, and courts subsequent to the revision experienced difficulty distinguishing between the warranties.¹⁹⁸ Because of the definitional overlap between ordinary fitness and redhibition, courts have struggled to determine whether the warranties are mutually exclusive or, rather, can be breached by the same set of facts, leaving buyers and sellers across the state subject to vastly different rights and obligations.¹⁹⁹

A. Fitness for Ordinary Use: Codified Confusion

The warranty of fitness for ordinary use is neither an independent nor a meaningful addition to Louisiana law; it has always been present in the case law, and its applicability has always been ambiguous.²⁰⁰ Despite the valiant efforts of the courts,²⁰¹ the warranty of fitness for ordinary use remains incompatible with Louisiana law, both doctrinally and

194. Odinet, *supra* note 62, at 764.

195. *Id.* LA. CIV. CODE arts. 2520, 2524.

196. *See, e.g.*, LA. CIV. CODE arts. 1994, 1995, 2013, 2524, 2531, 2534, 2541.

197. *See* discussion *infra* Part II.A.1.

198. LA. CIV. CODE ANN. art. 2524 cmt. a; *see, e.g.*, Sw. La. Hosp. Ass’n v. BASF Constr. Chems., LLC, 947 F. Supp. 2d 661, 701 (W.D. La. 2013) (“[I]n contrast, a product is not fit for ordinary use ‘[w]hen the seller has reason to know the particular use the buyer intends for the thing, or the buyer’s particular purpose for buying the thing, and that the buyer is relying on the seller’s skill or judgment in selecting it.’”); Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc., 262 So. 2d 377, 380 (La. 1972) (“Two warranty obligations are inherent in every sale, the warranty of merchantable title and the warranty of reasonable fitness for the product’s intended use.”); Jackson v. Breard Motor Co., 167 La. 857, 120 So. 478, 478 (1929) (in a redhibitory action, the court stated, “Automobile which is not in running condition does not comply with warranty of fitness for intended purpose”).

199. *See* discussion *infra* Part II.A.2.

200. *See* LA. CIV. CODE ANN. art. 2524 cmt. a.

201. *See* discussion *infra* text accompanying notes 246–50.

practically,²⁰² in part because it is the product of an entirely different legal system—the common law system.²⁰³ Louisiana imported the common law concept of ordinary fitness without appreciating that it was already ingrained in the law and without ascribing to it any independent meaning.²⁰⁴ In addition, because things having redhibitory defects are, by definition, useless or have significantly diminished usefulness or value, the legislation governing the warranties of redhibition and fitness for ordinary use contains a definitional overlap: the presence of a redhibitory defect results necessarily in the absence of fitness for ordinary use.²⁰⁵ Consequently, the warranty of fitness for ordinary use will never develop in Louisiana where defective goods are governed adequately under the laws of redhibition.²⁰⁶

Moreover, because the legal frameworks applicable to fitness and redhibition differ substantially²⁰⁷ and neither the legislation nor the doctrine provides a sensible distinction between the two, courts have struggled to set outer limits for the applicability of each warranty.²⁰⁸ The lack of guidance has caused inevitable inconsistency throughout the jurisprudence, further intensifying the confusion.²⁰⁹

1. Fitness for Ordinary Use and Redhibition: The Confusing Overlap

To date, no court has articulated an adequate distinction between the warranties of fitness for ordinary use and redhibition in a way that facilitates a coherent and reliable enforcement of rights,²¹⁰ likely because no meaningful distinction exists. The Louisiana Third Circuit Court of

202. See discussion *infra* Part II.A.1.

203. Since fitness for ordinary use is defined in terms of defects, it has no place in Louisiana, where the laws of redhibition adequately govern defective goods. See discussion *supra* Part I.C.

204. See discussion *supra* Part I.D.

205. Logically, the presence of a redhibitory defect results in the absence of fitness for ordinary use. Bilbe, *supra* note 20, at 147. See H.B. 106, 1993 La. Sess. Law Serv. Act 841.

206. See discussion *infra* Part II.A.1.

207. See discussion *infra* Part II.A.2.

208. See discussion *infra* Part II.A.1.

209. See, e.g., Cassidy v. Ford Motor Co., No. 15-2483, 2016 WL 687621 (E.D. La. Feb. 19, 2016); Sw. La. Hosp. Ass'n v. BASF Constr. Chems., LLC, 947 F. Supp. 2d 661 (W.D. La. 2013); Justiss Oil Co. v. T3 Energy Servs., Inc., No. 1:07-cv-01745, 2011 WL 539135 (W.D. La. Feb. 7, 2011); Fontenot v. Saxby, 34 So. 3d 477 (La. Ct. App. 2010); Cunard Line Co. v. Datrex, Inc., 926 So. 2d 109 (La. Ct. App. 2006).

210. See discussion *infra* Part II.A.1.

Appeal set forth the best attempt at a distinction between the warranties in *Cunard Limited Line Co. v. Datrex, Inc.*, stating, “[W]e conclude that [article 2524] applies to a situation in which the cause of action is based, not on the defective nature of the thing at issue, but on its fitness for ordinary use and/or for a particular use or purpose.”²¹¹ The court’s language suggests that a thing is unfit for use only if it is not also defective.²¹²

In *Cunard*, the court addressed a dispute over the applicable prescriptive period for an action related to defective lighting systems on cruise ships.²¹³ Cunard Line Co. (“Cunard”) purchased lighting systems from Datrex for installation on its cruise ships to comply with International Maritime Organization regulations.²¹⁴ Following installation, Cunard sued Datrex, alleging that a number of problems developed immediately, “including, but not limited to, shorting out” and also that the Coast Guard found the systems did not comply with safety standards.²¹⁵

On appeal, Cunard argued that the warranty of fitness provided an alternative cause of action for defective products—along with an additional prescriptive period of ten years—to a cause of action in redhibition.²¹⁶ Cunard argued that its claim fell within the ambit of article 2524 for two reasons: (1) the Datrex system was unfit for ordinary use on a cruise ship; and (2) it relied on Datrex’s skill in selecting the system, and Datrex was aware that Cunard’s particular purpose for installing the system was compliance with the regulations.²¹⁷ In essence, Cunard argued that its claim fell under the warranty of fitness for either ordinary or particular use.²¹⁸ The court disagreed, noting that Cunard’s cause of action arose out of the allegedly defective condition of the lighting systems.²¹⁹ It

211. *Cunard Line Co.*, 926 So. 2d at 114.

212. *Id.* See also *Stroderd v. Yamaha Motor Corp., U.S.A.*, No. 04-3050, 2005 WL 2037419, at *3 (E.D. La. Aug. 4, 2005) (“[A] breach of contract of fitness for ordinary use claim is only an independent cause of action when an item is free from redhibitory defects.”); *PPG Indus., Inc. v. Indus. Laminates Corp.*, 664 F.2d 1332, 1335 (5th Cir. 1982) (“[T]he courts in Louisiana have held unequivocally that actions based on a breach of warranty against defects are to be brought in redhibition instead of as a breach of contract.”).

213. *Cunard Line Co.*, 926 So. 2d 109.

214. *Id.* at 111.

215. *Id.*

216. *Id.* at 112.

217. *Id.*

218. *Id.*

219. *Id.* at 113. The court found significance in Cunard’s failure to demonstrate that a properly functioning Datrex system would fail to meet either International Maritime Organization requirements or Cunard’s needs or purposes. *Id.*

concluded that the systems were not suitable for ordinary use or for Cunard's particular purpose because they were defective, which put his claim squarely within the ambit of redhibition.²²⁰ Rather than clarifying what warranty of fitness for ordinary use meant or was intended to address, the court explained only what the warranty did not mean, emphasizing that the warranty of fitness for ordinary use is not another version of the warranty of redhibition.²²¹

In contrast, many decisions equate breach of the warranty of fitness with the existence of a defect in the thing.²²² The Exposé des Motifs accompanying the Sales Revision cites multiple cases as authority²²³ for the proposition that prior to the revision, judges formulated a warranty of fitness that was seemingly indistinguishable from the warranty against latent defects.²²⁴ Indeed, even the two cases that the Exposé des Motifs

220. *Id.* Unlike the breach of warranty of fitness for ordinary use, the breach of the warranty of fitness for particular use is not dependent on the existence of a defect. The existence of a defect, however, may put a buyer's claim within the ambit of redhibition as opposed to fitness for particular use. *See generally* LA. CIV. CODE arts. 2520, 2524 (2018).

221. *Cunard Line Co.*, 926 So. 2d at 113.

222. LA. STATE L. INST., *supra* note 146, at 5 (prepared for Meeting of the Council by Saul Litvinoff, Reporter).

223. *See, e.g., Crawford v. Abbott Auto. Co.*, 101 So. 871 (La. 1924) ("Unless warranty be expressly waived, the vendor warrants that the thing sold is fit for the purpose intended."); *Jackson v. Breard Motor Co.*, 120 So. 478, 479 (La. 1929) ("Automobile which is not in running condition does not comply with warranty of fitness for intended purpose.") (the action was one in redhibition); *Falk v. Luke Motor Co.*, 112 So. 2d 683, 989 (La. 1959) ("[A]s is commonly known, a car which will not run or which runs intermittently, requiring the frequent attention of a mechanic to keep it going is an abomination and is manifestly not fit or acceptable for the purposes intended."); *Bartolotta v. Gambino*, 78 So. 2d 208, 211–12 (La. Ct. App. 1955) ("[A]ll that the buyer need show is the actual existence of such defects as render[ed] the article unsuitable for its intended uses."); *Cosey v. Cambre*, 204 So. 2d 97, 100 (La. Ct. App. 1967) ("[P]urchaser of an automobile is entitled to receive a vehicle which will meet his needs, and [a] car which is not in running condition is not fit for the purposes intended by the buyer."); *Craig v. Burch*, 228 So. 2d 723, 728 (La. Ct. App. 1969) ("[V]endor warrants the thing sold to be fit for its intended purpose."); *Radalec Inc. v. Automatic Firing Corp.*, 81 So. 2d 830 (La. 1955) (in which the defense to the suit is founded on three grounds, one of which being that the action of redhibition will not lie because the implied warranty of fitness of the units has been fulfilled); *Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc.*, 262 So. 2d 377 (La. 1972) ("[T]he rule may also be applied . . . to new automobile that proves unfit for use because of latent defects.").

224. H.B. 106, 1993 La. Sess. Law Serv. Act 841.

cites as recognizing a stand-alone warranty of fitness²²⁵ did not meaningfully distinguish between ordinary fitness and redhibition.²²⁶ Instead, the court in both cases made broad statements regarding the warranty of fitness alongside traditional declarations about redhibition.²²⁷

In *Rey v. Cuccia*, the buyer of a camper-trailer sought to recover from the seller on grounds of redhibition because the trailer had come apart shortly after being put to use.²²⁸ After conducting a typical redhibition analysis, the Louisiana Supreme Court stated, “In Louisiana sales, the seller is bound by an implied warranty that the thing sold is free of hidden defects and is reasonably fit for the product’s intended use.”²²⁹ Although the court acknowledged that both warranties are implied in every sale, it failed to recognize any rights or duties the warranty of fitness creates beyond those imposed under the warranty of redhibition, concluding that the trailer contained redhibitory defects at the time of the sale.²³⁰ Thus, even if the court named the warranty of fitness separate from the warranty of redhibition, such nominal recognition did not affect the case’s outcome.²³¹

Subsequently, in *Hob’s Refrigeration & Air Conditioning, Inc. v. Poche*, the seller of a home-air conditioner compressor sued to recover on an open account.²³² On appeal, the litigants disputed the duration, rather than the existence or breach, of the warranty of fitness.²³³ Citing *Rey*, the Louisiana Supreme Court again stated that “the seller is bound by an implied warranty that the thing sold is free of hidden defects and is reasonably fit for the product’s intended use.”²³⁴ The court affirmed the

225. *Rey v. Cuccia*, 298 So. 2d 840 (La. 1974); *Hob’s Refrigeration & Air Conditioning v. Poche*, 293 So. 2d 546 (La. 1974).

226. H.B. 106, 1993 La. Sess. Law Serv. Act 841. If anything, these two cases depict the Louisiana Supreme Court’s embracement of the warranty of fitness for *particular* use (as opposed to ordinary use). See discussion *infra* note 234.

227. *Odinet*, *supra* note 62, at 762.

228. *Rey*, 298 So. 2d at 840.

229. *Id.* at 842. The Court also established that where a thing becomes unfit for its intended purpose during normal and foreseeable use, and no abnormal and unforeseeable use or intervening cause is proven, a strong inference arises that the thing contained a defect, regardless of whether the actual cause of the unfitness or defect is proven. *Id.* at 845.

230. *Bilbe*, *supra* note 20, at 138; see *Rey*, 298 So. 2d at 840.

231. *Rey*, 298 So. 2d at 845.

232. *Hob’s Refrigeration & Air Conditioning, Inc. v. Poche*, 304 So. 2d 326 (La. 1974).

233. *Id.* at 327.

234. *Id.* In both *Rey* and *Hob’s Refrigeration*, the Court stated that the product must be “reasonably fit for [its] intended use.” *Rey*, 298 So. 2d at 842; *Hob’s*, 304 So. 2d at 327 (emphasis added). Arguably, then, the Introduction is correct that

trial court's finding that the compressor did not comply with the implied warranty of fitness with which it was purchased because "[a] compressor purchased for \$450 for a home-air conditioner should reasonably be expected to last longer than three months, even though purchased as a rebuilt unit."²³⁵ Again, the court acknowledged no difference in the law governing fitness and redhibition.²³⁶ *Hob's Refrigeration* offers only a minor contribution to a legal understanding of the warranty of fitness; it merely conveys that a thing reasonably fit for its ordinary purpose should be "reasonably expected to last."²³⁷

This senseless rhetoric, though problematic, is not inexplicable given the lack of legislative guidance as to the relationship between the warranties of fitness for ordinary use and redhibition.²³⁸ A plain reading of the articles reveals nothing about the interplay between redhibition and fitness.²³⁹ The commentary to the warranty of fitness article provides that "when the thing sold is not fit for its ordinary use, *even though it is free from redhibitory defects*, the buyer may seek dissolution of the sale and damages, or just damages, under the general rules of conventional obligations."²⁴⁰ In such a case, the buyer's action is one for breach of contract rather than redhibition.²⁴¹ This language suggests that the warranty of fitness applies only when the warranty of redhibition does not. In other words, being "unfit for ordinary use" excludes defective things.²⁴² On the other hand, the warranty of kind and quality, which the legislature also adopted during the revision, provides expressly that preference is to be given to the warranty of redhibition over the warranty set forth therein, clearly indicating that the two warranties are separate and distinct.²⁴³ If the legislature intended for the same inference to apply to the warranty of fitness, it would have likely included the same explicit language.²⁴⁴ The

the two cases created a stand-alone warranty of fitness—the warranty of fitness for *particular* use. See H.B. 106, 1993 La. Sess. Law Serv. Act 841.

235. *Hob's Refrigeration*, 304 So. 2d at 328.

236. *Id.*

237. *Id.*

238. See *supra* text accompanying notes 210–21; see also *infra* text accompanying notes 239–50.

239. See LA. CIV. CODE arts. 2520, 2524 (2018).

240. LA. CIV. CODE ANN. art. 2524 cmt. b (2018) (emphasis added).

241. *Id.*

242. See *id.*

243. LA. CIV. CODE art. 2529.

244. *Id.* ("When the thing the seller has delivered, though in itself free from redhibitory defects . . .").

ambiguous language set forth in the Code, however, provides little guidance as to the interplay between the warranties of fitness and redhibition.²⁴⁵

It is difficult, if not impossible, to find an example of a thing that is not defective but is unfit for ordinary use, although some courts have tried to force a distinction in accordance with the structure of the Code.²⁴⁶ In *Cunard*, for example, the issue of whether the warranty of fitness was intended to encompass the warranty against redhibitory defects, providing an additional cause of action for defective products, was *res nova* before the Louisiana Third Circuit.²⁴⁷ After construing the statute and considering legislative intent, the court found that the legislature intended to separate and categorize the different types of warranties applicable to sales rather than have all such warranties placed in the category of redhibition by default,²⁴⁸ noting that:

It is apparent that the legislature intended by Act 841 to address and clarify any confusion between the warranty against redhibitory defects and the warranty of fitness for ordinary use and/or for a particular use or purpose by enacting La. Civ. Code art. 2524 as a separate and distinct Article from La. Civ. Code art. 2520. It would appear superfluous or redundant for the legislature to have enacted two warranty statutes addressing the same subject matter, with no mention or indication of its reasoning for the overlap, such as to provide for an election of remedies and prescriptive periods.²⁴⁹

Evidently, the court felt compelled to give the warranty of fitness for ordinary use independent meaning, even though the revision purported not to change the law, and even though it is almost impossible to formulate a distinction.²⁵⁰

245. *See generally id.* arts. 2520, 2524.

246. *See, e.g.,* *Cunard Line Co. v. Datrex, Inc.*, 926 So. 2d 109 (La. Ct. App. 2006).

247. *Id.* at 113.

248. *Id.* at 114.

249. *Id.* at 113–14.

250. *Id.* Under this approach, the warranty of fitness applies exclusively to things that do not suffer from redhibitory defects but are otherwise unfit for ordinary use. *Id.* This approach begs the question of how something can be free from defects prohibiting its use or substantially diminishing its usefulness or value but simultaneously be unfit for its ordinary use. *See generally* LA. CIV. CODE arts. 2520, 2524.

2. *The Consequence of the Overlap: Effects of Classification*

The lack of a meaningful distinction between a thing unfit for ordinary use and one that suffers from a redhibitory defect would be of little consequence if the legislature had subjected the breach of the warranty of fitness for ordinary use to the same treatment as the breach of the warranty against redhibition. The distinction, though intellectually puzzling, would have no practical importance. Regardless of the source of the seller's liability, the result would be the same in terms of remedies and time limitations.²⁵¹ Rather than align the frameworks of fitness and redhibition, however, the legislature imposed a separate framework for fitness such that the pertinent rights, obligations, and remedies available to parties vary depending on the classification of their claim.²⁵²

To prevail in an action for redhibition, the buyer must establish a number of elements: (1) that a redhibitory defect existed in the thing sold;²⁵³ (2) that he neither knew of the defect nor was it apparent;²⁵⁴ (3) that the defect existed at the time of delivery;²⁵⁵ and (4) that the seller could

251. See *id.* arts. 2520–22, 2524, 2530–32, 2534, 2537–38, 2540–2541, 2545, 2548.

252. See *id.*

253. *Id.* art. 2520. A defect is redhibitory when: (1) “it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect”; or (2) “without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price.” *Id.* Apparent defects are not redhibitory vices. LA. CIV. CODE ANN. art. 2521 cmt. a (2018).

254. LA. CIV. CODE art. 2521 (“The seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things.”). Apparent defects are not redhibitory vices. LA. CIV. CODE ANN. art. 2521 cmt. a. An “apparent defect” is one that a reasonably prudent buyer, acting under similar circumstances, would discover by simple inspection of the thing. *Royal v. Cook*, 984 So. 2d 156, 163 (La. Ct. App. 2008). In determining whether an inspection is reasonable, a court should consider the buyer's knowledge and expertise, opportunity for inspection, and assurances the seller made. *Id.* But see LA. CIV. CODE ANN. art. 2521 cmt. d (“Under this Article the buyer must make more than a casual observation of the object; he must examine the thing to ascertain its soundness.”). Regardless of the gravity of the defects, the seller is not responsible for defects of which the buyer was aware, either because the seller disclosed it or because the buyer discovered it himself. *Id.* art. 2521 cmts. b, f.

255. LA. CIV. CODE art. 2530. The defect is presumed to have existed at the time of delivery if it appears within three days. *Id.* Even if a defect appears after three days from the date of delivery, the nature of the defect may allow the court

not or would not correct the defect when given the opportunity to do so.²⁵⁶ A buyer with a successful redhibition claim²⁵⁷ is entitled to either rescission of the sale or reduction of the purchase price, depending on the nature and extent of the defect.²⁵⁸ As long as the seller had no actual knowledge of the defect, the buyer must give him notice and an opportunity to repair the defect,²⁵⁹ and the seller is bound to do so.²⁶⁰ If the seller fails to repair or remedy the defect, he must return the purchase price with interest and pay a reimbursement for the reasonable expenses occasioned by the sale and preservation of the thing.²⁶¹ If the seller knew of the redhibitory defect, he is liable to the buyer for the return of the purchase price together with interest, reimbursement, damages, and attorney fees.²⁶² A seller who is liable in redhibition likewise has an action against the manufacturer of the thing for any loss sustained because of the redhibitory defect.²⁶³

to draw an inference that it existed at the time of delivery. LA. CIV. CODE ANN. art. 2530 cmt. c. *See, e.g.*, Perrin v. Read Imports, Inc., 359 So. 2d 738, 741 n.1 (La. Ct. App. 1978) (“Later-appearing defects do not enjoy that status as a matter of law, but in the absence of other explanation, defects which do not usually result from ordinary use for the time passed may be inferred to have pre-existed the sale.”) (citation omitted).

256. LA. CIV. CODE art. 2522 (unless the seller has actual knowledge of the existence of a redhibitory defect, the buyer must give the seller timely notice of the defect as to allow him the opportunity to make repairs); *id.* art. 2531 (a seller who did not know that the thing he sold had a redhibitory defect is bound to repair or correct it).

257. The law of redhibition precludes a buyer who knew or should have known of the redhibitory defect from obtaining any form of relief. *Id.* art. 2521.

258. *Id.* art. 2520. A buyer may choose to seek only a reduction of the price even when the redhibitory defect is one giving him the right to obtain rescission of the sale. *Id.* art. 2541. On the other hand, when a buyer seeks rescission of a sale on the grounds of redhibition, the court may limit the buyer’s remedy to a reduction of the price. *Id.*

259. *Id.* arts. 2522, 2531.

260. *Id.* art. 2531.

261. *See id.* art. 2522 (“A buyer who fails to give that notice suffers diminution of the warranty to the extent the seller can show that the defect could have been repaired or that the repairs would have been less burdensome, had he received timely notice.”).

262. *Id.* art. 2545. The buyer is not required to give notice to a seller who has actual knowledge of the existence of a redhibitory defect in the thing sold. *Id.* art. 2522.

263. *Id.* art. 2531. This warranty cannot be waived. *Id.* Any contractual provision attempting to limit or diminish recovery by a seller against the manufacturer has no effect. *Id.*

Unlike the warranty of redhibition, the general rules of conventional obligations govern the warranty of fitness.²⁶⁴ Accordingly, a buyer may obtain dissolution of the sale and recover compensatory damages²⁶⁵ that the seller's failure to comply with the warranty causes.²⁶⁶ A bad faith seller is liable for all damages, foreseeable or not,²⁶⁷ that are a direct consequence of his failure to perform.²⁶⁸ A buyer must make reasonable efforts to mitigate the damage the seller's nonperformance causes; if he fails to do so, the seller may demand that the damages be reduced accordingly.²⁶⁹ A buyer who concealed facts from the seller that he knew or should have known would cause a failure of performance may not recover damages.²⁷⁰ If the buyer's negligence contributed to the failure to perform, the damages are reduced in proportion to the buyer's negligence.²⁷¹ Generally, a buyer who alleges breach of warranty of fitness may not recover attorney fees.²⁷²

The legislature's failure to align the frameworks of fitness and redhibition has required courts to tease out the distinctions between redhibition and fitness for ordinary use to determine the scope and nature of a seller's liability—an impossibly arduous burden.²⁷³ Various courts have questioned whether a seller may be held liable for breach of warranty of fitness and breach of warranty against redhibitory defects simultaneously,²⁷⁴ but unfortunately,

264. *Id.*

265. Damages consist of the loss the buyer sustained and the profit of which he was deprived. *Id.* art. 1995

266. *Id.* arts. 1994, 1995, 2013.

267. “Foreseeable damages are such damages as may fall within the foresight of a reasonable man.” LA. CIV. CODE ANN. art. 1996 cmt. b (2018).

268. LA. CIV. CODE art. 1997. Under general contract law, a bad faith obligor “intentionally and maliciously fails to perform his obligation,” as opposed to a bad faith seller under redhibition, who knows of the defect but fails to declare it. *See* LA. CIV. CODE ANN. art. 1997 cmt. b; *see also* LA. CIV. CODE art. 2545.

269. LA. CIV. CODE art. 2002.

270. *Id.* art. 2003.

271. *Id.*

272. It is well-settled in Louisiana that attorney fees are not recoverable unless a statute or contract clearly provides for them. *See, e.g.,* Kiefer v. Bernie Dumas Buick Co., 210 So. 2d 569 (La. Ct. App. 1968).

273. *See* discussion *supra* Part II.A.1.

274. *See, e.g.,* 425 Notre Dame, LLC v. Kolbe & Kolbe Mill Work Co., No. 15-454, 2016 WL 1110232, at *5 (E.D. La. Mar. 22, 2016); Cassidy v. Ford Motor Co., No. 15-2483, 2016 WL 687621, at *4 (E.D. La. Feb. 19, 2016); Sw. La. Hosp. Ass'n v. BASC Constr. Chems., LLC, 947 F. Supp. 2d 661 (W.D. La. 2013); Justiss Oil Co. v. T3 Energy Servs., Inc., No. 1:07-cv-01745, 2011 WL 539135,

courts have remained split on the issue. Resolution of the controversy is essential, as it dictates the applicable legal framework.²⁷⁵

According to numerous Louisiana decisions, when a cause of action is based on a defect, the buyer is limited to recovery under the laws of redhibition, and he may not disguise his grievance as a fitness claim in an effort to take advantage of the more favorable law.²⁷⁶ When courts hold that the warranty of fitness is entirely distinct from the warranty of redhibition,²⁷⁷ redhibition subsumes any otherwise pertinent fitness claim because the causes of action are mutually exclusive.²⁷⁸ In *Cunard*, for example, the court held that when a buyer's action is based on the allegedly defective nature of the thing, his recovery is limited to the prescriptive period for redhibition, and he may not bring a claim in fitness to avail himself of the longer prescriptive period.²⁷⁹ Additionally, in the 2014 decision of *Mouton v. General Power Systems, Inc.*, the Louisiana Third Circuit Court of Appeal noted that a generator that "began to show signs that it was defective . . . has proven defective for purposes of Louisiana redhibition law[.]" and thus, the buyer's cause of action lied in redhibition.²⁸⁰ Accordingly, the court held that the ten-year prescriptive period for conventional obligations was inapplicable.²⁸¹

at *5 (W.D. La. Feb. 7, 2011); *Cunard Line Co. v. Datrex, Inc.*, 926 So. 2d 109 (La. Ct. App. 2006).

275. See sources cited *supra* note 274.

276. See, e.g., *Stroderd v. Yamaha Motor Corp., U.S.A.*, No. 04-3040, 2005 WL 2037419, at *3 (E.D. La. Aug. 4, 2005) ("Plaintiffs claim for breach of contract of fitness for ordinary use fails for an independent reason as well: it is subsumed by Louisiana redhibition law."); *Mouton v. Generac Power Sys., Inc.*, 152 So. 3d 985, 990 (La. Ct. App. 2014); *Cunard Line Ltd. Co.*, 926 So. 2d at 114.

277. See, e.g., *Cunard Line Co.*, 926 So. 2d at 109; *Mouton*, 152 So. 3d at 990; *Chesapeake La., L.P. v. Innovative Wellsite Sys., Inc.*, No. 12-2963, 2014 WL 5796794, at *5 (W.D. La. Nov. 6, 2014).

278. For example, in 2014, a federal district court held similarly that if a product suffers from redhibitory defects, a party's claims for breach of warranty of fitness are subsumed by his claim for breach of warranty against redhibitory defects. *Chesapeake*, 2014 WL 5796794, at *5.

279. *Cunard Line Co.*, 926 So. 2d at 114. See also *Stroderd*, 2005 WL 2037419, at *3 ("[The] claim of breach of contract of fitness for ordinary use fails for an independent reason as well: it is subsumed by Louisiana redhibition law."); *Mouton*, 152 So. 3d at 990; *Hollybrook Cottonseed Processing, LLC v. Carver, Inc.*, 2010 WL 892869, at *8 (W.D. La. 2010); *Mumford v. Jackson Nat. Life Ins. Co.*, 2007 WL 7711472, at *4 (La. Ct. App. 2007); *PPG Indus., Inc. v. Indus. Laminates Corp.*, 664 F.2d 1332, 1335 (5th Cir. 1982).

280. *Mouton*, 152 So. 3d at 991.

281. *Id.*

On the other hand, when courts hold that the warranties of fitness and redhibition are not mutually exclusive, the buyer essentially gets two bites at the apple.²⁸² Indeed, a number of federal district courts have held that, so long as the shorter prescriptive period for redhibition has not expired, the plaintiff may bring an additional claim for breach of warranty of fitness.²⁸³ In *Southwest Louisiana Hospital Association v. BASC Construction Chemicals, LLC*, for example, a federal district court stated, “[C]laims for breach of contract for fitness of ordinary use and for redhibition are not mutually exclusive; thus, when a party alleges that a product has a redhibitory defect, it may also argue that the redhibitory defect rendered the product unfit for its ordinary use.”²⁸⁴ This authorization allows a buyer multiple avenues of recovery for the same defect and thus creates doubt as to the obligations between the buyer and the seller.²⁸⁵

282. See sources cited *infra* note 283.

283. See, e.g., *425 Notre Dame, LLC v. Kolbe & Kolbe Mill Work Co., Inc.*, No. 15-454, 2016 WL 1110232, at *5 (E.D. La. Mar. 22, 2016); *Cassidy v. Ford Motor Co.*, No. 15-2483, 2016 WL 687621, at *4 (E.D. La. Feb. 19, 2016); *Sw. La. Hosp. Ass’n v. BASC Constr. Chems., LLC*, 947 F. Supp. 2d 661, 690 (W.D. La. 2013); *Justiss Oil Co. v. T3 Energy Servs., Inc.*, No. 1:07-cv-01745, 2011 WL 539135, at *5 (W.D. La. Feb. 7, 2011).

284. *Sw. La. Hosp Ass’n*, 947 F. Supp. 2d at 690, 690–92 (“[The] one-year prescriptive period on the Hospital’s redhibition claim has not expired, and thus the Hospital is free to assert claims under both art. 2520 and art. 2524 in the absence of conflicting prescriptive periods.”). In the same opinion, the court interpreted *Cunard* as standing for the proposition that fitness and redhibition are “separate and distinct” causes of action that could be present in an action collectively or individually. *Id.* at 700. According to the court, “The crucial consideration is what type of issue a buyer has with a product in determining whether the warranty of redhibition or the warranty of fitness applies.” *Id.* By that theory, if a product is unfit for ordinary use because of a redhibitory defect, the buyer would be limited to a cause of action in redhibition. *Id.*

285. See *infra* text accompanying notes 286–93. Some courts have tried to force different, similarly unsatisfactory distinctions between fitness and redhibition. See, e.g., *Mire v. Eatelcorp, Inc.*, 927 So. 2d 1113, 1118 (La. Ct. App. 2005) (holding that a redhibitory defect is a characteristic or component of the thing sold, rather than the entire thing itself, whereas if the thing “is by its nature not reasonably fit for its ordinary or intended use,” the rights of the buyer are governed by the rules of conventional obligations as opposed to redhibition). Other courts have mistakenly conflated the warranties of fitness and redhibition. See, e.g., *425 Notre Dame*, 2016 WL 1110232, at *4 (“The warranty of fitness is closely related to the warranty against redhibitory defects. . . . Because the same law applies to both warranties, the Court will discuss them together.”). Still others, including the Louisiana Supreme Court, have yet to rule on the issue.

Although Professor Litvinoff's proposed comments could have helped clarify the scope of each warranty's application, they were not incorporated into the official comments, thereby intensifying the problem.²⁸⁶ Litvinoff's commentary explained that: (1) the warranty of fitness applies in every sale irrespective of whether the thing is defective; and (2) the warranty of fitness applies regardless of whether the sale is subject to rescission on the grounds of redhibition.²⁸⁷ Under this regime, the buyer could seek rescission under redhibition and contractual damages under the warranty of fitness.²⁸⁸ On the other hand, when the warranty of fitness was proposed to the Law Institute Council, one member of the Council noted that the article addressed a thing that is not, in itself, defective.²⁸⁹ Under this view, the buyer would only have a cause of action for breach of warranty of fitness for a product that was not otherwise defective.²⁹⁰ Either approach would have provided a definitive answer.²⁹¹ In the law's current state, however, it remains unclear whether the legislature intended to recognize violations of the warranty of fitness in situations in which remedies exist under the law of redhibition.²⁹² By default, then, the courts have been left to resolve the uncertainty, producing results that have been less than satisfactory. Under the current state of the law, similarly situated parties remain subject to different prescriptive periods, burdens of proof, and remedies depending on whether the court decides to treat the warranties of fitness and redhibition as mutually exclusive or as concurrent causes of action.²⁹³

286. LA. STATE L. INST., *supra* note 146, at 7 (prepared for Meeting of the Council by Saul Litvinoff, Reporter). Although the proposed comments would have clarified confusion as to the overlap between the warranties of fitness and redhibition, the comments would not have solved the problem of allowing the buyer two shots at recovery. *Id.* Thus, although the comments would have made the relationship between the warranties clearer, the law would still be unfair. *Id.*

287. *Id.* If these comments had been adopted and made clear that the remedies co-exist, buyers would be entitled to recover twice for the same defect under the warranty of fitness for ordinary use, which is problematic. The comments would clarify the law regarding the warranty of fitness for particular use, which may apply to a product that is not defective in itself but not fit for the buyer's particular use.

288. *Id.*

289. LA. STATE L. INST., *supra* note 161, at 5.

290. *Id.*

291. *Id.*

292. Bilbe, *supra* note 20, at 141.

293. *See generally* LA. CIV. CODE arts. 2520, 2521, 2522, 2530, 2534 (2018); *see also* discussion *supra* Part II.A.2.

B. Fitness for Particular Use: A Meaningful Addition to Louisiana Law

Whereas adoption of the warranty of fitness for ordinary use was unnecessary in light of prior Louisiana jurisprudence,²⁹⁴ the warranty of fitness for particular use was an important contribution to Louisiana's law of sales. Unlike the questionable applicability of the warranty of fitness for ordinary use,²⁹⁵ it is easy to imagine a situation in which a thing is free from redhibitory defects but nonetheless unfit for particular use.²⁹⁶ For example, suppose that Betty Buyer from the earlier hypothetical was a photographer looking for a printer capable of printing her photographs. If the printer does not catch fire, but instead is incapable of printing on photo paper, the printer does not suffer from a redhibitory defect—it remains a fully functional printer.²⁹⁷ Nonetheless, it is unfit for Betty's particular purpose of printing pictures.²⁹⁸

In a jurisprudential example, *Downs v. Hammett*, Downs bought a piece of immovable property, intending to subdivide the land into four tracts to be used for homes for herself and her children.²⁹⁹ She later executed an act of exchange with Hammett Properties, Inc. (“Hammett”), in which she exchanged her house and a promissory note for the 3.947-acre tract of land.³⁰⁰ After the exchange, Downs learned that an ordinance restricted the subdivision of her land to tracts consisting of a minimum of 1.25 acres each, making it impossible for her to subdivide her land in accordance with her original plan.³⁰¹

On appeal, Downs alleged that Hammett knew of the ordinance that made the property unsuitable for her intended use but sold her the property anyway and thus defrauded her.³⁰² The court ultimately did not apply the warranty of fitness for particular use because Downs did not allege that she relied on the skill or judgment of the seller in selecting the tract of

294. See discussion *supra* Part II.A.1.

295. See Part II.A.1.

296. See LA. CIV. CODE arts. 2520, 2524.

297. See *generally id.* Likewise, the printer remains fit for its ordinary use of printing.

298. *Id.* As long as Betty could prove that Suzie has knowledge of her particular purpose—to print pictures—and that Betty was relying on her expertise in selecting the printer, Betty would have a viable claim under the warranty of fitness for particular use. *Id.* art. 2524.

299. *Downs v. Hammett Properties, Inc.*, 899 So. 2d 792, 793 (La. Ct. App. 2005).

300. *Id.*

301. *Id.*

302. *Id.* at 796. The court noted that “[a]n ordinance that restricts the subdivision of property is not a ‘defect’ or ‘vice’ in the ‘thing sold’ within the meaning of [article 2520]; it is merely a restriction on the use of the property.” *Id.*

land; however, the court did acknowledge that the law recognizes a cause of action against the seller when such reliance exists.³⁰³ The warranty of fitness for particular use thus carries an independent purpose: providing remedies to buyers of non-defective things that do not meet their expectations.³⁰⁴

In contrast to the ambiguous warranty of fitness for ordinary use, the warranty of fitness for particular use is readily applicable to sales outside the scope of redhibition.³⁰⁵ The Louisiana Civil Code explicitly provides two prerequisites that trigger the warranty of fitness for particular use: (1) the seller must have reason to know the buyer's particular use for the thing or the buyer's particular purpose for buying it; and (2) the seller must have reason to know that the buyer is relying on his skill or judgment in selecting the thing.³⁰⁶ Despite this clear legislative guidance, courts struggle to impute meaning into the meaningless warranty of fitness for ordinary use,³⁰⁷ which may inhibit the warranty of fitness for particular use from development.

303. *Id.*

304. *Id.*

305. *See* discussion *supra* Part II.A.1.

306. LA. CIV. CODE art. 2524 (2018). Although the Code provides adequate guidance for separating the warranties of fitness for particular and ordinary use, some courts have conflated the two concepts. *See, e.g.*, 425 Notre Dame, LLC v. Kolbe & Kolbe Mill Work Co., Inc., No. 15-454, 2016 WL 1110232, at *4 (E.D. La. Mar. 22, 2016) (“The warranty of fitness is closely related to the warranty against redhibitory defects. . . . Because the same law applies to both warranties, the Court will discuss them together.”); *see also* Sw. La. Hosp. Ass’n v. BASC Constr. Chems., LLC, 947 F. Supp. 2d 690, 701 (W.D. La. 2013) (purporting to set forth a distinction between a redhibitory defect and the warranty of fitness for ordinary use but was painstakingly confused about the difference in fitness for ordinary and particular use). Citing article 2524, the *Southwest Louisiana Hospital Ass’n* court stated, “[I]n contrast, a product is not fit for ordinary use ‘[w]hen the seller has reason to know the particular use the buyer intends for the thing, or the buyer’s particular purpose for buying the thing, and that the buyer is relying on the seller’s skill or judgment in selecting it.’” *Id.* It appears the courts that are confusing the two warranties of fitness are reading article 2524 conjunctively as opposed to disjunctively, thus merging the warranties of fitness for ordinary and particular use into a single warranty.

307. *See* discussion *supra* Part II.A.1.

III. SOLUTION: REPEAL OF THE WARRANTY OF FITNESS FOR ORDINARY USE

The warranty of fitness for ordinary use has no place in Louisiana law.³⁰⁸ The warranty has never had any independent meaning prior to or since the 1995 revision and has only spurred uncertainty among the courts.³⁰⁹ The artificial classification scheme between ordinary fitness and redhibition subjects similarly situated parties to different prescriptive periods, measures of damages, and remedies for inexecution, which is highly undesirable.³¹⁰

Even when courts correctly recognize that warranty of fitness and redhibition are the same, the law remains problematic because election of remedies undermines redhibition.³¹¹ A thing that suffers from a redhibitory defect will likewise be unfit for ordinary use,³¹² and in most cases, a breach of the warranty of fitness entitles the buyer to seek damages, as well as dissolution of the sale, a broader remedy than is provided under redhibition.³¹³ Unlike the warranty of redhibition, with its numerous requirements and exclusive remedies, Louisiana Civil Code article 2524 is short and open-ended.³¹⁴ Consequently, buyers are incentivized to pursue an action under breach of warranty of fitness rather than redhibition when both causes of action exist.³¹⁵

Thus, the existence of the warranty of fitness for ordinary use as a stand-alone warranty detracts from redhibition, which is at the heart of Louisiana sales law.³¹⁶ After decades of development, redhibition strikes the proper balance between buyers and sellers by providing specific rules exclusive to sales.³¹⁷ As early as 1966, it was recognized that “[t]he historical reason for application of this shorter [redhibitory] prescription period . . . is the practical necessity to determine promptly and certainly

308. See discussion *supra* Part II.A.1.

309. See discussion *supra* Parts I.B.2 & II.A.1.

310. See discussion *supra* Part II.A.2.

311. If warranty of fitness for ordinary use and redhibition mean the same thing, the buyer can elect to bring his claim under either cause of action.

312. Bilbe, *supra* note 20, at 140.

313. Larissa Teipner, *The Damage Carve-Out of the Louisiana Products Liability Act: Are Manufacturers Potentially Liable for Warranty of Fitness?*, 70 LA. L. REV. 615, 625 (2010).

314. Odinet, *supra* note 62, at 764.

315. Teipner, *supra* note 313, at 624. See discussion *supra* Part II.A.2.

316. See discussion *supra* Part I.B.1.

317. Odinet, *supra* note 62, at 767.

whether the article sold did or did not have the vices claimed.”³¹⁸ Because redhibition is deeply embedded in the civil law,³¹⁹ its preservation is vital. Accordingly, buyers should not be given the choice between fitness for ordinary use and redhibition for the same defect.³²⁰ If given the choice, buyers will almost always choose to bring their claims under the warranty of fitness, which will lead necessarily to the unwelcome demise of redhibition.³²¹

Louisiana could avoid these problems if the law of redhibition governed all issues concerning things unfit for ordinary use without concern for whether the items are “defective.” Courts should address products that are not defective, but otherwise not up to the buyer’s particular standards, under the umbrella of general contract law using the warranty of fitness for particular use.³²² To accomplish this objective, the legislature must repeal the warranty of fitness for ordinary use. Repealing the warranty of fitness for ordinary use will promote clarity and uniformity throughout the law of sales in Louisiana without detracting from the substantive law.

Because the warranty of redhibition already encompasses breach of fitness for ordinary use,³²³ a repeal of ordinary fitness will not undermine the substantive law. As Professor Litvinoff recognized, “[A]ll situations falling under the U.C.C. warranty of fitness are contemplated by the Louisiana Civil Code as instances covered either by the warranty of redhibition or as breach of contract.”³²⁴ In other words, even when a buyer cannot point to a particular physical defect or underlying cause of a product’s malfunction, if the product proves to be unfit for use because it is defective, the buyer may bring a claim in redhibition.³²⁵ Hence, repeal will marry the warranties of redhibition and fitness for ordinary use rather

318. *Victory Oil Co. v. Perret*, 183 So. 2d 360, 363 (La. Ct. App. 1966). *See also Justiss Oil Co. v. T3 Energy Servs., Inc.*, 2011 WL 539135, at *5 (W.D. La. 2011) (“[Permitting] the plaintiff to proceed on the contractually based warranty of fitness with its 10 year prescriptive period would have entirely vitiated the protections of Louisiana’s comparatively brief one year prescriptive period under the warranty against redhibitory defects.”).

319. *See* discussion *supra* Part I.B.1.

320. *See supra* text accompanying note 315.

321. *See* discussion *supra* part I.B.1.

322. *See generally* LA. CIV. CODE arts. 2520, 2524 (2018).

323. *See* discussion *supra* Part II.A.1.

324. LA. STATE L. INST., *supra* note 146, at 7 (prepared for Meeting of the Council by Saul Litvinoff, Reporter).

325. *See, e.g., Rey v. Cuccia*, 298 So. 2d 840 (La. 1974).

than abolish the concept of fitness for ordinary use.³²⁶ The goal of consolidating the warranties is to direct Louisiana courts to interpret redhibition broadly so as to encompass breaches of fitness for ordinary use without concern of importing general contract law to situations that ought to remain under redhibition.³²⁷

The warranty of fitness for particular use should remain as an independent cause of action for breach of contract.³²⁸ This warranty does not generate any of the problems that the warranty of fitness for ordinary use creates.³²⁹ Courts still must distinguish between the existence of a redhibitory defect and a breach of the warranty of fitness for particular use, but this distinction is intuitive, with relevant articles providing sufficient guidelines on each.³³⁰ Furthermore, because the legislation provides clear guidance as to the scope of the warranty's application such that it is applicable only when the additional elements are met,³³¹ the use of the warranty of fitness for ordinary use alleviates the concern of undermining redhibition. Additionally, repeal of fitness for ordinary use will let fitness for particular use stand alone, making it easier for courts to appreciate that it is a separate warranty, distinct from redhibition.³³² Indeed, repealing ordinary fitness is necessary to give fitness for particular use an opportunity to develop.³³³

326. See generally discussion *supra* Parts II.A.1–2.

327. See generally discussion *supra* Parts II.A.1–2.

328. See generally LA. CIV. CODE art. 2524 (2018).

329. See *infra* text accompanying note 330.

330. To prevail in an action for redhibition, the purchaser must establish the following: (1) that the thing sold contains a defect that renders it absolutely useless or that diminishes its usefulness so that it must be presumed that a buyer would still have bought it but for a lesser price (LA. CIV. CODE art. 2520); (2) that the defect existed at the time of delivery; (*id.* art. 2530); (3) that the defect was neither known by him nor apparent (*id.* art. 2521); and (4) that the seller could not, or would not, correct the defects when given the opportunity to do so (*id.* art. 2522). The warranty of fitness, on the other hand, only applies when: (1) the seller has reason to know the particular use the buyer intends for the thing or the buyer's particular purpose for buying it; and (2) that the buyer is relying on the seller's skill or judgment in selecting it. *Id.* art. 2524.

331. See generally *id.* art. 2524.

332. See discussion *infra* note 333.

333. The ten-year prescriptive period applicable to warranty of fitness claims survives long after a redhibition claim, which expires against a good faith seller four years from delivery of the thing or one year from discovery of the defect and against a bad faith seller one year from discovery of the defect. See LA. CIV. CODE art. 2534. Courts are addressing cases in the context of prescription because plaintiffs are filing suit after the one-year redhibitory claim prescribes but before

Along with the repeal of ordinary fitness, the legislature must outline the interplay of the warranties of redhibition and fitness for particular use in a situation in which an item is unfit for a particular purpose only because of a redhibitory defect.³³⁴ When a thing sold contains a redhibitory defect, the law of redhibition should govern.³³⁵ Moreover, if a thing suffers from a redhibitory defect, the buyer ought to be limited to a cause of action in redhibition even when that defect renders the thing unfit for the buyer's particular use, the seller knew of the buyer's intended use, and that the buyer was relying on his skill in selecting the thing.³³⁶ In other words, as a policy matter, the legislature should provide that the warranties of redhibition and fitness for particular use are mutually exclusive causes of action.³³⁷ Revision comments to that effect are necessary.³³⁸

CONCLUSION

The contribution of the warranty of fitness for ordinary use to Louisiana sales law since its codification in 1995 can be summed up in one word: confusion.³³⁹ The warranty has no independent meaning in Louisiana and has prompted discrepancies among the courts.³⁴⁰ Without clarity in the legislation, the courts can never be consistent. Consequently, the legislature must repeal the warranty of fitness for ordinary use.³⁴¹ Repealing the warranty of fitness for ordinary use will promote clarity and uniformity throughout the law of sales in Louisiana without detracting

the warranty of fitness claim prescribes, and defendants are filing exceptions of prescription in response. *See, e.g.,* Sw. La. Hosp. Ass'n v. BASC Constr. Chemicals, LLC, 947 F. Supp. 2d 661 (W.D. La. 2013); *Justiss Oil Co. v. T3 Energy Servs., Inc.*, No. 1:07-cv-01745, 2011 WL 539135 (W.D. La. Feb. 7, 2011); *Cunard Line Co. v. Datrex, Inc.*, 926 So. 2d 109 (La. Ct. App. 2006). Courts are therefore forced to determine—often at the peremptory exception phase—whether the product contains a defect in order to rule on the exception and decide whether the claim will proceed. If this trend continues, the warranty of fitness will never develop because courts will continue dismissing cases based on the existence of defects rather than the merits of the warranty.

334. Bilbe, *supra* note 20, at 142. As a rule of statutory construction, the particular controls over the general, so defective things should remain under the realm of redhibition.

335. LA. CIV. CODE art. 2520.

336. *See generally id.*

337. *See* discussion *supra* Part II.A.1.

338. *See* discussion *supra* Part II.A.1.

339. *See* discussion *supra* Parts II.A.1–2.

340. *See* discussion *supra* Parts II.A.1–2.

341. *See supra* Part III.

from the substantive law.³⁴² Cases regarding breach of ordinary fitness are sufficiently addressed under the warranty of redhibition, and the warranty of fitness for particular use sufficiently covers cases of non-defective but otherwise non-conforming goods.³⁴³ Thus, the repeal will not create a gap in the law but, instead, will merge the concepts of redhibition and fitness for ordinary use. Indeed, repeal of the warranty of fitness for ordinary use is vital for the preservation of redhibition, as well as the development of fitness for particular use, both of which will increase overall stability throughout Louisiana sales law.

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342. See discussion *supra* Part III.

343. See discussion *supra* Part III.

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